TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 89.

THE SPRINGER LAND ASSOCIATION ET AL.,
APPELLANTS,

vs.

PATRICK P. FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED DECEMBER 9, 1895.

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 13, 1897.

1 Be it remembered that heretofore, to wit, on the twentieth day of July, 1893, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certain transcript of record from the district court in and for the county of Colfax, in said Territory; which said transcript is in the words and figures following, to wit:

2 *Transcript of Record.*

TERRITORY OF NEW MEXICO, }
Fourth Judicial District, County of Colfax. }

Be it remembered, that heretofore, to wit: on the thirtieth day of June, in the year eighteen hundred and ninety, Patrick P. Ford, by his solicitors, filed in the office of the clerk of the district court of the fourth judicial district, of the Territory of New Mexico, sitting within and for the county of Colfax, his bill of complaint, which said bill of complaint is in words and figures following, to wit:

Bill of Complaint.

In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of Colfax.

To the Hon. James O'Brien, chief justice of the supreme court of the Territory of New Mexico, and judge of the district court, sitting in and for the county of Colfax for the trial of causes arising under the laws of said Territory:

Your orator, Patrick P. Ford, a resident of the State of Colorado, by his solicitor, J. D. O'Bryan, Esq., complains of the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, Wm. A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, the Maxwell Land Grant Company, a corporation, Rudolph V. Martensen, Chas. Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter and Frank Springer, trustees of the said Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company, and complaining says:

That, to wit, on the 20th day of October, 1888, your orator entered into a certain contract with the Springer Land Association,
3 an unincorporated body composed as your orator is informed, and so states the fact to be, of the following-named persons, to wit: Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William J. Comstock, which said contract is in writing, and a copy whereof is attached to the mechanics' lien hereinafter *and* referred to, and a copy of which said lien, together with all indorsements thereon, and of said contract, is hereunto attached and made a part of the bill, whereby he contracted to furnish all necessary tools and labor, and perform all

the work of grading required in the construction of the Cimarron ditch, and its accessories, in accordance with the terms of said contract and specifications thereto attached.

That the said ditch is called the Cimarron ditch and is situate in Colfax county, Territory of New Mexico, and begins at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax aforesaid, being in length about twenty-six miles; and the said ditch has appurtenant thereto, along its entire length, land as passageway about sixty feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east.

All of which ditch, laterals, reservoirs and lands as aforesaid are plotted and laid out on the plan, and which is made a part of this bill.

And your orator further avers, that he began the said work on the said ditch, on or before to wit: the first day of November, 1888, and prosecuted the same continuously until to wit: the twenty-first day of June, 1889, when the said work was completed in substantial compliance with the said contract, and was then and there accepted.

And your orator further avers, that he was an original contractor in the work on the said ditch, and that within ninety days after the completion of the said work, he filed for record with the county recorder of Colfax county, a claim containing a statement of his demands, together with the description of the property to be charged with a lien, in accordance with the terms of an act of legislature in such cases made and provided, which said claim was verified by the oath of your orator, and filed for record July 3rd, 1889, and
4 recorded in Book "H" of the said recorder's office, page 1 to 8, as required by law.

And your orator further avers, that the said The Springer Land Association, at or about the time of the commencement of the said work by your orator, but at what particular time your orator is unaware, transferred unto the Springer Land Association, a corporation duly organized under the laws of the Territory of New Mexico, all their right, title and interest in and to the said work, and to the ditch and land, with the accessories there-, but your orator is unable to state the terms or nature of the transfer and assignment, the same being exclusively within the knowledge of the said association and the said corporation.

And your orator avers that during the greater part of the time that he was engaged on the work on the said ditch and reservoirs, he was in communication with the officers of said corporation, and

received part payment on said contract work, from time to time from them through their said officers and agents, and that in all things the said corporation acting as aforesaid, through their agents and officers, claim to be the owners of the said ditch, land, reservoirs and other property above described.

And your orator avers, that the said The Springer Land Association, the corporation aforesaid, by its acts and conduct with your orator, assumed the obligations of the Springer Land Association, in reference to said contract with your orator, and thereby became and are liable to your orator on the said contract, along with the said The Springer Land Association, and the persons who composed the latter association.

And your orator further avers that prior to the making of the contract with your orator, as above stated, the Maxwell Land Grant Company, who your orator is informed and believes, and so states the fact to be, owned the land hereinbefore mentioned, and still claims to have some right, title or interest in the said land, had entered into a contract by which the Springer Land Association was to have the right to construct said ditch and its reservoirs and accessories, on the land of the said Maxwell Land Grant Company, and by which the said land, as well as the twenty-two thousand acres of land above described, was to belong to the said, The Springer Land Association, but the exact nature of said contract, its terms and conditions, are unknown to your orator, the same being in the exclusive knowledge of the said Maxwell Land Grant Company, and the said The Springer Land Association, and the other parties defendants, and which said contract your orator prays may be fully disclosed, and set forth in the answers of the said defendants.

And your orator further avers, that during the whole time that he was doing the work on the said ditch, reservoirs and accessories thereto, the Maxwell Land Grant Company, and the Springer
5 Land Association, the corporation aforesaid, had knowledge that the work was being done on the ditch and land, yet neither of the said corporations and association gave any notice, either within three days after such knowledge was obtained, nor at any time, that they, or either of them, would not be responsible for the construction of the said ditch, and no notice as above was given in writing, by posting, or in any other manner to your orator.

Your orator avers that at the time of the completion of the work on the said ditch, as aforesaid, and of the acceptance of the same, there was due and owing to him on his said contract, by the Springer Land Association, and the individuals composing the same aforesaid, and by the Springer Land Association, the corporation aforesaid, a balance of money amounting to the sum of seventeen thousand six hundred thirty-four dollars and twenty-seven cents, for work done under the contract, and also the further sum of three hundred and ninety dollars for extra excavating and hauling, ordered by the engineer in charge of the said work, and which said amount was allowed by the said engineer, in pursuance of the provisions of the said contract.

And your orator avers that these two amounts were and are due

to your orator, as aforesaid, but that notwithstanding that the same is justly due to your orator, the Springer Land Association, and the individuals composing the same above named, as well as the Springer Land Association, the corporation, have refused, and still do refuse to pay the same or any part thereof.

Your orator therefore prays that the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, The Springer Land Association, the corporation, may make full answer under oath as to the transfer of the contract made by the Springer Land Association, with your orator, to the Springer Land Association, the corporation, and that they make answer to the other allegations and matters contained in this bill, but as to those matters an answer under oath is hereby specially waived.

And your orator further prays that the Maxwell Land Grant Company, and the persons hereinbefore named as trustees of the same, may disclose, and set forth, and if the same is in writing, may attach to their answer a copy of the contract entered into with the Springer Land Association, or with any person on their account, by the said Maxwell Land Grant Company, or by the receiver of the same, or by any other person on account of the said company, by which it was agreed that the said ditch might be built or constructed, and by which any and what land of the said Maxwell Land Grant Company would be given, sold, or otherwise de-
6 voted to the Springer Land Association, or to any person for its use, or by which the said association became or are entitled to any interest in any land of the said Maxwell Land Grant Company, and that their answer as to this matter shall be under oath, but as to all other matters and things proper to be answered unto, as set forth in this bill, shall not be under oath, an answer under oath being hereby specially waived.

And your orator further prays, that an account may be taken under the direction of this court, and when the sum is ascertained that is justly due your orator, a decree be entered against the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and the Springer Land Association, the corporation above named, for the payment of the amount so ascertained to be due your orator, together with the costs and charges of this suit, and the cost of filing his lien, and for a reasonable counsel fee for complainant's counsel; and for a foreclosure of the said mechanics' lien against the ditch, laterals, reservoirs, and accessories, and the land hereinbefore described, and against the last above-named defendants, and also the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, and that it be decreed that the said property be sold for the payment of the debt found to be due, your orator, together with the costs and charges expended and incurred in this suit, and counsel fee as above stated, which your orator alleges to be 10 per cent. of the amount of said debt so to be ascertained.

And your orator further prays that if by such sale of the property subject to the lien, there should be a deficiency of proceeds to pay your orator in full, that a decree be entered for such deficiency against the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and the Springer Land Association, the corporation aforesaid, and that said judgment and decree be docketed and execution issued thereon as provided by law.

And that subpœna issue from this honorable court, directed to the said The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation, the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter and Frank Springer, trustess of the Maxwell Land Grant Company, commanding them and each of them to be and appear before this honorable court, on a cer-
7 tain day and under a certain penalty therein to be fixed, then and there to answer all and singular the allegations, matters and things therein set forth, and to stand abide and perform by such order and decree in the premises, as shall seem, meet and agreeable to equity and good conscience.

P. P. FORD.

J. D. O'BRYAN,
Solicitor for Court.

STATE OF COLORADO, }
County of Arapahoe, } *ss:*

Personally, appeared before me, Patrick P. Ford, who being duly sworn, deposes and says that he has heard read the foregoing bill in equity, and is acquainted with the contents thereof, and that all the facts therein stated are true, except such facts as are stated upon information and belief, and as to them he believes them to be true.

Sworn and subscribed to, before me, this 27th day of June, 1890.

GEORGE E. VAN HEYNIGEN,
[SEAL.] *Notary Public.*

My commission expires April 10th, 1894.

Copy of Claim of Lien.

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

PATRICK P. FORD, Contractor,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company; Rudolph V. Martensen, Chas. Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Owners or Reputed Owners.

This is to give notice that Patrick P. Ford hereby files this, his claim of lien, as an original contractor, with the county recorder of the county of Colfax, Territory of New Mexico, against all that certain ditch, canal and reservoir, commonly known as the Cimarron ditch and its accessories, the said ditch beginning at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax, Territory aforesaid, being in length about 26 miles; and the said ditch and land appurtenant thereto for right of way, being of about the uniform width of sixty feet, together with all lateral ditches and reservoirs, and the land covered by, and appurtenant to the same, as aforesaid, as also
8 twenty-two thousand acres of land appurtenant to said ditch, the said land being also in said county, and under the ditch to be irrigated thereby, and described according to the townships and sections, to wit:

Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east, all of which ditch, laterals, reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien to secure the payment of the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents ($17,634.27), the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said The Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of

lien. As also for the further sum of three hundred and ninety dollars ($390.00) for extra excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract; all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past, the said work being on the said last date then completed and accepted, the same being within ninety days from the completion of said ditch.

The names of the reputed owners of the land hereinbefore mentioned are the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, trustees of said company acting under the name, style, and title of the board of trustees of the Maxwell Land Grant Company.

Claimant was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president.

The terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof.

PATRICK P. FORD.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } *ss:*

Patrick P. Ford, being duly sworn, doth depose and say that he is the claimant above named, and that he has read the foregoing claim of lien, and that the facts therein stated are true, except such facts as are stated upon information and belief, and that as to such facts he believes them to be true.

Witness my hand and seal, at Las Vegas, N. M., the second day of July, A. D. 1889.

CHARLES RUDULPH,
[SEAL.] *Notary Public.*

Commission expires March 23rd, 1892.

Contract and Specifications for the Cimarron Ditch.

Contract.

This agreement made and entered into this 20th day of October, 1888, by and between P. P. Ford, party of the first part, and the Springer Land Association (by C. N. Barnes, general manager, approved by C. C. Strawn, president), a duly organized association, party of the second part, witnesseth: That for and in consideration of the covenant and agreements hereinafter set forth, the parties hereto mutually agree and bind themselves as follows: The party of the first part agrees to furnish all necessary tools and labor, and perform all the work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance to the specifications hereto attached and made a part of this contract.

Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1st, 1889. The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached. It is hereby mutually agreed that as the substance of clause "X" for ten of the specifications, concerning the time in which said work is to be completed, is of vital importance to the company, no extension of time beyond the date fixed shall be asked or granted, except for causes mentioned, and that the failure of the contractor to fulfill the obligations herein assumed will work a forfeiture to the company of all the retained percentage accumulated to that date, and shall be considered by both parties in the light of liquidated damages retained by the company through such failures. In witness whereof, we have hereunto set our hands and seals this 26th day of October, A. D. 1888.

P. P. FORD,
C. N. BARNES,
General Managers Springer Land Association.

Approved by—
C. C. STRAWN,
President Springer Land Association.

Specifications.

For the grading of the Cimarron ditch:

1. Gradations.—Under this general head will be included all excavations and embankments required for ditch and reservoirs; all excavations required for foundations of flumes and gates and other structures, and the grading approaches to bridges, as well as any and all kind of grading work incident to the completion of the work herein contemplated.

2. Excavations.—All excavations for ditches will be made to the full width and depth, and for such slopes as shall be indicated by the engineer. Bottom of ditches shall be smoothly dressed to grade, level across, and cleared of all loose stones and other matter, which might make a rough or uneven surface. Slopes will be smoothly dressed to conform to the straight or curved line indicated by the stakes. All excavated material will be classified as earth.

3. Embankments.—Materials taken from excavations will be placed in adjoining embankments as follows: First. The bank on the lower side of the ditch will be built to the full height and width, indicated by the engineer, a berm of four feet width being left between inner top of bank and edge of excavation. Second. The remaining material will be used on level ground to build the bank on upper side. Third. Any excess of material will then be wasted on the outside of lower bank, but never piled in hills on top of bank. The price for excavation includes a free haul of one hundred feet. Material for greater distance will be paid for at the rate

of two cents per one hundred feet or fraction thereof in excess of the haul distance.

4. Special embankment.—There will be built across several depressions, to serve as settling basins and to increase capacity of small reservoirs. They will be built in every case by borrowing material from the inner or water side of the embankment. No borrow pit will be allowed nearer than fifteen feet from the toe of the bank. Material used will be placed in layers not more than ten inches in thickness, driving lengthwise the bank in every case. All banks shall be built to such additional height*h* to compensate for shrinking or settling, as the engineer may direct, with extra charge. The side of these banks will be deeply plowed with parallel furrow, four feet apart, lengthwise of the bank, before filling is begun.

Reservoir No. 7.—The embankment for this reservoir will be as follows: First. The site will be deeply plowed lengthwise, under strips of four furrows inside each, with spaces of six feet between the strips. Second. On the line marked for the top of the embankment a trench eight feet wide and one to four feet deep will be executed, the material being placed in the outer side of the embankment. The trench will then be filled with borrowed material, wheel scrapers being used and driven lengthwise. The cost of this preparatory work, aside from the yardage of the trench, will be included in the price named for the embankment. All material used in this embankment will be borrowed from the inner or water side, leaving a beam of twenty-five feet from the toe. The price named for embankment will include the total haul, as no over-haul estimate will be made. The dimensions of this bank will be as follows: Width on top, twelve (12) feet; inner slope, three (3) feet horizontal to one (1) foot vertical; the outer slope will be one and one-half ($1\frac{1}{2}$) to one (1). The greatest height on center line will be twenty-six (26) feet.

11

5. Borrow.—In case the excavation should fail to furnish sufficient material for adjacent embankment, these will be completed from borrowed pits; no such pits being allowed nearer than fifteen (15) feet from the toe of the embankment. Borrowed material will be measured in embankment, and *paye*d for the same at same rate as other work.

6. All risk of damage or loss to the work from floods, or other casualties, will be assumed by the contractor, until his work has been accepted, and no charge for loss or deterioration on this account will be allowed, but a reasonable extension of time may be granted by the engineer.

7. Contractors must carefully *pe*rserve all stakes and bench-marks, and persistent destruction of these will involve a charge for resetting.

8. Contractors will not sell, or allow to be sold, any intoxicating liquors on or near the work. Disorderly or quarrelsome persons will be discharged at the request of the engineer. It is specially stipulated that should the contractor or any other person, directly or indirectly connected with the work, establish a store or commissary so called, for the sale of supplies or other goods to employees,

such store or commissary shall be conducted honestly and fairly, and on a plan of strict justice. The company is determined that the practice of defrauding employees through the medium of false or extortionate charges shall not prevail on this work. The right is therefore reserved by the company to absolutely annul this contract as to any uncompleted work at any time on satisfactory and unrefuted proof being rendered. The violation of this rule will be considered a breach of contract, and will work a forfeiture of all retained percentages to that date.

9. Contractors must inform themselves by personal examination as to the nature of the soil, the general features of surface, accessibility and all other matters affecting the contract. The quantities given by the engineer are approximate only, nor will any information furnished by the engineer or his assistants on any of the above points, relieve the contractor of any part of his obligation to fully complete his work. The contractor will give personal attention to the work.

12 10. Time.—As the time specified for the time of completion of the work herein contemplated is an essential feature of the contract, no extension of time will be granted, provided, however, that should the work be seriously delayed by continuously inclement or hard freezing weather, or the like unavoidable cause, the engineer may, at his discretion, grant an extension of time equal to that so lost. If at any time during the progress of the work the engineer shall judge that the force employed is insufficient to insure its completion within the limit of time stipulated in the contract, he may order an increase of force as will, in his judgment, accomplish the desired purpose, and the contractor, on receiving written notice to that effect, will immediately take the necessary steps to comply therewith.

11. Extra work.—No extra work will be allowed or paid for unless done under written order from the engineer, which order shall bear as an endorsement the agreed price for the same. In case of disagreement between the parties to the contract, as to the intent and meaning of any part of these specifications, such matter shall be referred to the engineer, and his decision shall be final and binding on both parties.

12. Damages.—The contractor will be held strictly responsible for all damages to the property or crops of persons along the line of work.

13. Subcontracts.—Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer.

14. All orders of the engineer concerning any part of the work must be promptly obeyed.

15. Estimates.—On or about the first day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the

same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate, will only be paid upon satisfactory showing that
13 the work is free from all danger, from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work.

14 And afterwards, to wit, on January 3rd, 1891, there was filed in said clerk's office, an answer of the defendants, which said answer is in words and figures as follows, to wit:

Answer of Defendants.

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District of the Territory of New Mexico, Sitting in and for the County of Colfax.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } No. 1301. Chancery.

The answer of the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, to the bill of complaint of Patrick P. Ford.

The said defendants above named, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained for answer thereunto, or to so much and such parts thereof as these defendants are advised, it is material or necessary for them to make answer unto answering, say:

That they admit that on, to wit: the 20th day of October, A. D. 1888, the complainant, Patrick P. Ford, entered into a certain contract with the Springer Land Association, an unincorporated body composed of the following-named persons, to wit: Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William J. Comstock at said date, which said contract is in writing, and that a copy of said writing is attached to the copy of the mechanics' lien in the bill of complaint

referred to, but whether the copy attached to this bill of complaint, purporting to be a copy of the mechanics' lien in said bill referred to, is a true and correct copy, these defendants do not know and are not informed, and therefore are unable to admit or deny, and whether the alleged copy of said alleged mechanics' lien contains all endorsements thereon, these defendants do not know and cannot admit or deny. Defendants admit that by virtue of the said written contract, a copy of which purports to be attached to the bill of complaint, that the complainant contracted to furnish all necessary tools and labor and to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, and in accordance with the term- of said contract and the specifications thereto attached, and admit that said written contract was by the Springer Land Association and said Christopher C. Strawn, C. N. Barnes, Melville W. Mills, Frederick J. Eames, William A. Comstock, transferred to The Springer Land Association, corporation, defendant herein.

These defendants further admit, that the said ditch was called the Cimarron ditch, and was situate in Colfax county, Territory of New Mexico, and begins at a point where the Ponil and Cimarron rivers meet to form the Cimarron river, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax aforesaid, being in length about twenty-six miles; and that the said ditch has and appurtenant thereto along its entire length, land as passageway about sixty feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch, twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby and described as follows, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east; all of which ditch laterals, reservoirs and lands as aforesaid, are plotted and laid out on the plan and made a part of the bill of complaint.

These defendants further admits, that complainant began the said work on the said ditch on or before, to wit: the first day of November, 1888, but deny that he prosecuted the same continuously until, to wit: the 21st day of June, A. D. 1889, when the said work was completed with substantial compliance with the said contract and was then and there accepted; and deny that the said work was ever completed in substantial compliance, or in compliance at all with the said contract; and deny that the said work was on the said 21st day of June, A. D. 1889, or at any other time accepted, but to the contrary, these defendants aver that the said work was not on the said 21st day of June, 1889, or at any other time completed by the complainant, or by his procurement in substantial compliance with the said contract, but the same was left and abandoned by the complainant over the protest and objection of the Springer Land Asso-

ciation, in an incomplete and wholly unfinished condition, and has never been accepted or received by these defendants, or by any one or more of them.

These defendants further answering, admit that the com-
16 plainant was an original contractor in the work on the said ditch, but deny that within ninety days after the completion of said work, that he filed for record, with the county recorder of Colfax county, a claim containing a statement of his demands, together with the description of the property to be charged with a lien, in accordance with the terms of an act of legislature in such case made and provided, and de*nies* that any such claim was verified by the oath of complainant and filed for record July 3rd, 1889, and recorded in Book "8," of the said recorder's office, pages 1 to 8, as required by law.

These defendants further answering, admit that the said The Springer Land Association at or about the time of the commencement of the said work by the complainant, transferred unto the Springer Land Association, a corporation duly organized under the laws of the Territory of New Mexico, all their right, title and interest in and to the said work, and to the ditch and land, with the accessories there and therewith connected.

These defendants, further answering, deny that during the greater part of the time that complainant was engaged on the work on the said ditch and reservoirs, that he was in communication with the officers of said corporation, but admit that complainant received part payment on said contract work, from time to time, from said Springer Land Association, through their officers and agents; and admit that in all things the said corporation, through its agents and officers, claimed to be the owners of said ditch, lands, reservoirs and other property in the bill of complaint described.

These defendants, further answering, admit that The Springer Land Association, corporation defendant in this action, by its act and conduct with the complainant assumed the obligations of the Springer Land Association in reference to the said contract with complainant and admit that the Springer Land Association corporation thereby become liable to the complainant on said contract, for any sum which might become due and payable to the complainant, in the event that complainant completed and performed said contract. But these defendants deny that the persons who composed the Springer Land Association, became liable to the complainant on account of work performed on said contract, and deny also that the Springer Land Association corporation became liable along with the said Springer Land Association, for work under such contract.

These defendants, further answering, admit that prior to the making of the contract with complainant, as above stated, that the Maxwell Land Grant Company owned the land hereinbefore men-
17 tioned, and still claim to have some right, title or interest in the said land, and admit that the said Maxwell Land Grant Company had entered into a contract by which the Springer Land Association was to have the right to construct said ditch and

its reservoirs and accessories on land of the said Maxwell Land Grant Company, but deny the said land, as well as the twenty-two thousand acres of land above described, was to belong to the said The Springer Land Association; a copy of which said contract with the said Maxwell Land Grant Company, is in writing, and is attached to this answer as part thereof, to which reference is made for the particular terms of said contract, said copy being marked "Exhibit A."

And the said defendants, further answering, say that they admit that during the whole time complainant was doing work on the said ditch, reservoirs and accessories thereto, the Maxwell Land Grant Company and the Springer Land Association, and The Springer Land Association corporation, defendant in this action, had knowledge that the work was being done on the ditch and land and deny that neither the said association, or either of the said corporations, gave any notice, either within three days after such knowledge was obtained, nor at any time, that they or either of them would not be responsible for the construction of said ditch; and further, deny that no such notice was given to the complainant in writing, by posting, or in any other manner, during the time that he was performing work under said written contract.

The defendants, further answering, deny that the work on said ditch or on said reservoirs ever was completed, and deny that at the time of the alleged completion of the work on the said ditch, and at the time of the alleged acceptance of the same, that there was due and owing to complainant on his said contract, by the Springer Land Association and the individuals composing the same aforesaid, and by the Springer Land Association, a corporation aforesaid, a balance of money amounting to the sum of seventeen thousand and six hundred and thirty-four dollars and twenty-seven cents, for work done under the contract; and also, the further sum of three hundred and ninety dollars, for extra excavating and hauling, ordered by the engineer in charge of the said work, and deny that said amount was allowed by said engineer in pursuance of the provisions of the said contract; and deny that any extra excavating or hauling was ordered by said engineer or allowed for by him or performed by the complainant; and deny that there is due and owing to the said complainant on his said contract, by the Springer Land Association and the individuals composing the same aforesaid, and by the Springer Land Association, a corporation aforesaid, or by either of said corporation or said association or said individuals, at the commencement of this action, any sum whatever, for or on account of work done by complainant under said written contract, or
18 for or on account of extra work done by him on said ditches or reservoirs.

These defendants, further answering, deny that there is justly due to the complainant for work done under said contract, or for extra excavating and hauling, any sum whatever, or that any sum on such account was due to him at the commencement of this action, but admit that the Springer Land Association and the individuals composing the same above named, as well as the Springer

Land Association corporation as aforesaid, have refused, and still do refuse to pay the complainant any sum whatever over and above what he has already been paid for or on account of any work alleged to have been done by him under said contract.

The defendants further aver as to extra work sued for, that no extra work was ever done by the plaintiff on said work, reservoirs, ditches or embankments, under any written order from the engineer in charge of said work, and that no such extra work was ever done under any written order bearing an endorsement or statement of any character of the agreed price for such extra work; and further avers that neither the complainant and the defendant, or any of the defendants, or any of its agents or employees or the engineer, mutually agreed upon to superintend said work, ever agreed together upon the performance of such extra work or made any written order providing for such extra work, containing an endorsement or statement of the agreed price for the same as required by specification of the alleged written contract attached by the complainant to his bill of complaint as an exhibit thereto.

These defendants, further answering, aver that the Springer Land Association, a corporation, ought not to be bound or liable for, nor should any of these defendants, any estimate made by the engineer placed in charge of the said work referred to in the bill of complaint under the contract attached thereto, because they aver that said engineer, in making such estimates, was either grossly negligent and inattentive to his duties as such engineer, relating to such estimate, so that he greatly overestimated the work performed by the complainant for which such estimates were made, by mistake or inattention, making the same much greater than the work done for which such estimates were given; or such engineer was induced or procured to overestimate such work, by being in some way, to these defendants unknown, fraudulently misled, imposed upon and overreached by the complainant, or his agents, employees or confederates, and thereby caused to make overestimates in the interest of the complainant, all of which was procured by complainant by the means aforesaid, to enable him, upon and by means of such overestimates, to collect and to procure from the defendants for such work, from time to time, and particularly as to the last estimate, a sum of money largely in excess of anything earned by com-
19 plainant, or due to him, so they aver that by the means aforesaid the said complainant has already procured from and been paid by said Springer Land Association corporation, a sum of money in the aggregate more than is due or coming to him for and on account of the work and labor in the bill of complaint mentioned.

These defendants further aver, that the right to audit and determine the amount to be paid by the said Springer Land Association corporation, on estimates rendered by the engineer rested entirely with the said Springer Land Association, and that said association was not bound to pay overestimates procured as aforesaid, and by reason of such overpayment so procured said association refuses to audit or pay any further estimates.

The defendants, further answering, aver that they are not, nor are any of them, liable to pay, or legally bound, for any final estimate made by the said engineer in charge of said work for the additional cause, to wit, that there never has been by the complainant made to these defendants, or any of them, or to the said Springer Land Association by the complainant, any satisfactory showing, or any showing at all, that the work is free from all danger from liens or claims of any kind, on account of indebtedness incurred by the complainants, in carrying on said work, as required by specification 15 of the contract attached to the bill of complaint, nor are these defendants, nor any of them, either indebted or are liable to pay complainant, because they aver that persons claiming to be subcontractors, performing work and furnishing material for said ditches, embankments and reservoirs under the complainant, filed claims for liens on said real estate in the office of the probate clerk of the county of Colfax, including therein all the property described in the bill of complaint, claiming such liens against the complainant and upon said property for work and labor so done, and claiming large amounts, to wit, in the aggregate, ten thousand dollars, to be due in the aggregate, and owing to such claimants from the complainant, and claiming that he has failed to pay such indebtedness, or to liquidate the same, which said claims for liens stand of record today as clouds and apparent incumbrances upon the property described in the bill of complaint, and did so exist at the commencement of this action; and many of said lien claimants began proceedings in the district court for the fourth judicial district, sitting in the county of Colfax, to enforce such claims for lien against the complainant and these defendants for the foreclosure and enforcement of such claims for liens, asking to have the same declared to be a lien on the property described in the bill of complaint, and further asking that said court decree a sale of said property to make such claims for liens, many of which suits were pending at the commencement of this action.

These defendants further aver that the complainant wholly neglected to settle such alleged liens, or to take any steps to remove the same from off said property described in the bill of complaint, so as to leave such property free from the danger of sale, resulting from such actions, and neglected and refused to defend against them, or to institute proceedings in any way to have closing of lien released, removed or decreed to be of no effect; and said defendant, The Springer Land Association, corporation, was in consequence of such negligence and omissions on the part of the complainant, and his failure to comply with such specification No. 15, compelled in said actions and at a great loss of time to such association in convenience and expense for solicitors' fees, costs and otherwise, to wit: in the sum of five thousand dollars, to defendant in said actions, all of which complainant under his said contract was in duty bound to do, before calling upon the Springer Land Association for payment under said contract, and before said association under said contract, became liable to pay any final estimate thereunder; they aver that it is the duty of said complainant to

remove all of said claims for lien, clouds and incumbrances on the said property, before proceeding farther with his said action and before the defendants or any of them, or the said property described in the bill of complaint can be held liable for any work done by complainant, under said contract.

These defendants further aver, that said complainant under the said fifteenth specification was bound to settle up with all of his subcontractors on said work, and with persons furnishing him with materials connected therewith, and bound to place, said work ditches, reservoirs, dams and real estate in such condition, as to render the same free from all danger, from liens or claims arising from the failure of the complainant to liquidate, settle and adjust for such work done and materials furnished. That complainant instead of performing his contract in that particular, abandoned the work and country, while claims were pending against him and against the property described in the bill of complaint for such labor done, and materials furnished, and allowed and permitted the title to such property to become greatly clouded, covered and incumbered, and claims for liens for such work and material against said complainant, to be filed under the laws of New Mexico, and particularly omitted and neglected to settle with one Henry Dargel, a subcontractor; that complainant entered into a contract with said Dargel, to perform work, labor and furnish material on or about said work to enable the said complainant to perform his contract and although such Dargel did a large amount of work thereon, the said complainant wholly refused to settle with said Dargel, but so *demanded* himself with reference to the work and labor so performed by the said Dargel, that he, the
21 said Dargel, filed with the probate clerk of the county of Colfax, and Territory of New Mexico, his claim for lien on said real estate, ditches, dams and reservoirs as a subcontractor, under said Ford, claiming such lien by virtue of the lien laws of the Territory of New Mexico, and said Ford refused and neglected to make any settlement or adjustment of said dam for lien in particular, or to bring any action to remove the incumbrance thereof, but permitted the said Dargel to bring an action to foreclose said lien in the said district court, and said Dargel did bring such action, and was at the commencement of this action, prosecuting such suit against the said Patrick P. Ford, and these defendants, and was claiming that there was due to him from the said Ford over three thousand dollars for work and labor done by him and materials furnished, as such subcontractor, all of which said Ford has continuously from the time of the filing of the said lien to the present time well known, the said complainant being a party defendant in said action. The said complainant has taken no steps whatever to free the said property from said claim, but has abandoned the said property and has not sought to protect it from said claim of lien, and thereby the defendant, The Springer Land Association, has been compelled to defend and is now defending against said action, and was so defending at the commencement of this suit and so the defendant avers that the complainant has not kept and performed his said contract, and is not entitled to have and receive anything

whatever on account of said work, or of the last estimate therefor, all other and former estimates having long since been paid.

These defendants further answering deny that the complainant is entitled to the relief or any part thereof, in said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to the said bill of complaint, and pray to be dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

LONG, FORT & BUNKER,
Solicitors for Defendants.

And afterwards, to wit, on January 3rd, 1891, there was filed in said clerk's office, Exhibit "A," to the answer of the defendants, which said Exhibit "A" is in words and figures as follows, to wit:

EXHIBIT "A."

This agreement, made on this, the first day of May, A. D. 1888, by and between Harry Whigham, of Raton, New Mexico, as receiver of the Maxwell Land Grant Company, and approved by M. P. Pells, as agent of the income bondholders of the Maxwell Land Grant Company, party of the first part, and C. C. Strawn, of Pontiac,
22 Ill.; W. L. Johnson, of Chicago, Ill.; M. W. Mills, of Springer, N. M., and such other persons as they may associate with them, which persons will hereafter, by a separate writing, make themselves parties to this contract, parties of the second part:

Witnesseth, that, whereas, on the 18th day of August, A. D. 1885, by the order of the district court of the first (now the fourth) judicial district of the Territory of New Mexico, sitting within and for the county of Colfax, made and entered in a certain action therein pending wherein Thomas J. Wright and others were complainants, it was, among other things, ordered and decreed that he, the said Harry Whigham, be appointed to receive the rents and profits of the real estate, freehold and leasehold, and to collect and get in the personal estate of the said Maxwell Land Grant Company, a certified copy of which order is hereto attached and made part hereof, as Exhibit "A;" and

Whereas, by the further order of said court, made and entered on the 31st day of May, A. D. 1887, it was further ordered, adjudged and decreed that the said Harry Whigham, as such receiver, be authorized to sell and execute deeds for the lands within the outboundaries of the tract of land known as the Beaubien & Miranda, or Maxwell land grant, situated in the Territory of New Mexico and the State of Colorado; provided, however, that such deeds, before being delivered, shall be approved by the said M. P. Pells, as agent of the income bondholders of the said Maxwell Land Grant Company, as aforesaid, and that such deeds shall receive the approval of the said district court, a certified copy of which last order is hereto attached and made part hereof, as Exhibit "B;" and

Whereas, the contract heretofore made between the said Harry Whigham, receiver, and the said M. W. Mills, of date December 1st,

1887, of and concerning about seventy thousand (70,000) acres of the land hereinafter mentioned, has been mutually surrendered and cancelled by the parties thereto, and is by these presents cancelled, set aside and abrogated; and

Whereas, the party of the first part, with a view of selling at an enhanced value certain lands, amounting to about twenty-two thousand (22,000) acres, lying east of the Ponil river, north of the Cimarron river, and west of the right of way of the New Mexico & Southern Pacific Railroad Company, and within the outboundaries of that portion of said land grant situate in the county of Colfax, in the Territory of New Mexico, and being duly authorized in the premises by said orders of said court, has projected a plan for the construction of large irrigating canals, ditches and reservoirs attached thereto, which said canals, ditches, reservoirs, are estimated,
23 in the judgment of experts, well qualified to make such estimates, who have carefully surveyed the same, to cost about fifty-six thousand dollars ($56,000.00); and

Whereas, the party of the first part is also desirous of and is duly authorized in the premises by said orders of said court, to dispose of other lands within that part of said land grant, within the Territory of New Mexico, lying in a body, and containing in all one hundred and ten thousand (110,000) acres, more or less, of unsold lands, bounded on the north by the line dividing townships numbers twenty-eight (28) north and twenty-nine (29) north, ranges numbers twenty-three (23) east and twenty-four (24) east, United States surveys, and bounded on the east by the east line of said land grant, and bounded on the south by the south line of said land grant, and bounded on the west by the line of the right of way of the New Mexico & Southern Pacific Railroad Company, (commonly called the Atchison, Topeka & Santa Fe Railroad Company); and

Whereas, the parties of the second part are desirous of engaging in the enterprise of developing and selling all the lands above described, and for that purpose have viewed the lands and investigated the circumstances and conditions appertaining to the same:

Now therefore, in consideration of the surrender and cancellation of the said Mills contract, as aforesaid, and the further consideration of the obligations hereinafter mentioned, to be kept and performed by the said parties of the second part, the said party of the first part agrees to and with the said parties of the second part, that he will reserve, set apart and hold from sale, except as hereinafter provided, said twenty-two thousand (22,000) acres of land under the ditch system hereinafter provided: Provided, however, that the said party of the first part hereby reserves to the said Maxwell Land Grant Company and its successors and assigns, out of the said tract of twenty-two thousand (22,000) acres, two thousand (2,000) acres under said ditch system, with a perpetual right to the use of the water of said ditches for the same without compensation, but otherwise upon the same terms and conditions as made to purchasers herein to be first selected in sections numbers twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in township number twenty-six (26) north, range number

twenty-one (21) east, of the second guide meridian east in the county of Colfax and Territory of New Mexico, for the sole benefit of the Maxwell Land Grant Company, without compensation; and, provided, further, that the parties of the second part shall within thirty (30) days after such ditch system has been finally located and the detail plans and specifications thereof have been completed
24 and submitted for the execution of the work, select lands under the said ditch system until they have selected the full amount of twenty thousand (20,000) acres from any lands under said ditch system, whether the same be east or west of the said right of way of the New Mexico & Southern Pacific Railroad Company, for their disposal, as herein provided:

And, the party of the first part in further consideration of the covenants herein to be kept and performed by the parties of the second part, does also agree to grant and convey by a proper instrument in writing, to a trustee to be appointed by the parties hereto, who shall hold the franchise for the joint benefit of both parties to this agreement, and issue certificates of ditch ownership as hereinafter provided, the right to take all the water which may flow in the Cimarron river at and below the mouth of the Ponil river, excepting so much thereof as may be held to legally belong to the vested right of any person or persons having lands on the stream below, and without prejudice to the water rights or privileges now in use of any person or persons holding or claiming, rightfully or wrongfully, as the case may be, lands of the said Maxwell Land Grant Company or its predecessors, and the grantees of said persons on said Cimarron and Ponil rivers and their tributaries, above the mouth of the said Ponil river:

And, in consideration of the herein-described valuable rights and privileges granted by the party of the first part, the parties of the second part hereby agree to provide without delay, the sum of sixty thousand dollars, ($60,000) or so much thereof as may be necessary, and to use the same in constructing in a good and workmanlike manner, the system of canals, ditches and reservoirs, upon the lands indicated by Exhibits "C" and "E" hereafter made a part hereof, and according to the detail plans and specifications, to be hereafter prepared by E. H. Kellogg, C. E., who is hereby mutually chosen and appointed by the parties of the first and second parts, as the engineer to superintend and approve the construction of said system of canals, ditches and reservoirs, and which detail plans and specifications shall be in harmony with, and not exceed the plans indicated in the transcript from the report and sectional plat of said E. H. Kellogg, hereto attached and made part hereof as Exhibits "C" and "E." The work of constructing said canals, ditches and reservoirs to be at the sole and exclusive cost and expense of the parties of the second part, and the same to be commenced on or before the 15th day of July, A. D. 1888, and completed within six (6) months from that date, or as soon thereafter as the same can be well, properly and economically done when vigorously prosecuted, considering the nature of the work and the character of the sea-
25 son; and, provided, the construction of the said canals, ditches

and reservoirs shall not cost to exceed said sum of sixty thousand dollars ($60,000):

And, the parties of the second part, further agree that they will at their own and sole cost and expense, use their best efforts to sell all of said twenty thousand (20,000) acres of land coming under said canals, ditches and reservoirs to purchasers for *bona fide* cultivation, settlement or occupancy, only in alternate sections, so far as it may be practicable and expedient so to do, and that all the same shall be sold at the earliest time hereafter possible, in accordance with the terms of this agreement, by the parties of the second part, for not less than one-fifth (1/5) in cash in hand at time *or* sale, the balance due to be paid in not exceeding ten (10) annual installments, each evidenced by two (2) promissory notes for the deferred payments, bearing seven (7) per cent. interest annually, each note to be for one-half (1/2) of any such annual deferred payment, and each note to be secured by a trust deed containing full, adequate and ample powers of sale in case — default in payment by the purchaser or purchasers, of any installment of principal or interest running to a trustee, to be mutually agreed upon and appointed hereafter, as the mutual trustee of the parties of the first and second parts, or the holder or holders of such promissory notes so secured as aforesaid, and a sufficient deed in fee-simple with full covenants of warranty of the premises sold, free and clear of all liens and incumbrances, except as to the reservations herein specified, and delivered to the purchaser or purchasers by the party of the first part, upon receipt by said trustee of *of* the said cash payment, and the execution and delivery by the purchaser or purchasers of the notes evidencing the deferred payments, and the trust deed securing the payment of the same with interest as aforesaid, and each cash payment and the said notes evidencing the said annual and deferred payments to be immediately distributed and delivered one-half (1/2) of the cash payment, and one (1) of the notes, evidencing one-half (1/2) of each annual deferred payment, to the party of the first part, the other one-half (1/2) of the cash payment, and the other of the notes evidencing one-half (1/2) of each annual payment to the parties of the second part to this contract, at the time of the receiving of said cash payments, and the taking of the said notes secured as aforesaid; the objects and purposes of the parties to this contract being, that, the parties of the first and second parts, shall each share equally in the proceeds of the sales of said lands, under said ditch system, and that the equal share of each party shall be received by each party at the time of the transaction as aforesaid.

And it is also mutually agreed between the parties hereto that as each annual payment becomes due, each party, or in
26 case of the assignment of the notes so due and unpaid, then the holder of such note or notes shall have the right to demand and receive payment of the same, and in case of default in such payment to require the trustee to proceed to collect any such defaulted note or notes with the costs, attorneys' fees and damages named in said trust deed, by foreclosure of such trust deed and enforcement of the powers of sale therein contained for the use

and benefit of the holder or holders of any such defaulted note or notes, and when collected said trustee shall immediately pay the amount of collection to the holder or holders of such defaulted note or notes, less such portion of said costs, attorneys' fees and damages as may be stipulated between such holder or holders of such defaulted note or notes and such trustee, shall be retained by such trustee as his compensation in the premises;

And, it is further mutually agreed between the parties hereto, that none of the lands under said irrigating ditch system shall be sold for less than the average price of fifteen dollars ($15.00) per acre, including the perpetual water privilege from said ditch system; provided, that if after such ditch system shall have been completed and the water turned in and the extent of the utility of the same demonstrated or ascertained, it shall be found that said land, notwithstanding the use of vigorous efforts upon the part of the parties of the second part will not sell at said average price of fifteen dollars per acre, then the parties to this contract shall mutually fix upon a less price for which said lands may and will sell in the market, and the party of the first part in such event having the preference to purchase at such mutually reduced price;

And, it is further mutually agreed between the parties hereto, that the party of the first part and the parties of the second part shall each pay one-half (½) of all the taxes lawfully assessed on the total valuation of all the unsold lands remaining from time to time, and that each party shall also pay one-half (½) of all the taxes that may be lawfully assessed upon any interest they may have remaining from time to time in said irrigating plant, including canals, ditches and reservoirs, if it shall be found that the same is lawfully assessable for taxation as independent and separate from the realty enhanced in value by the same;

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations, without compensation as to any of them, be and forever remain to and with the said The Maxwell Land Grant Company, which perpetual rights and reservations shall be contained in all deeds to all purchasers as covenants upon such purchasers and their grantees, running with the land:

27 First. The use of sufficient water from all streams, canals, ditches and reservoirs, for town, city and manufacturing purposes, excepting water power:

Second. Sufficient water for cattle, horses and other stock, with necessary access and right of way thereto along the said streams, canals, ditches and reservoirs and all of them, such access and right of way to be, as soon as may be hereafter designated, with the view to as little inconvenience as possible to actual cultivators, settlers and occupants. The parties of the second part, or the grantees of the said land under this contract, to receive notice of such access and right of way from the party of the first part:

Third. The exemption of the said The Maxwell Land Grant Company from liability to damages by the cattle, horses or other

stock of said company to crops upon any and all of the aforesaid lands:

Fourth. All the cement-rock rights heretofore granted to the Springer Cement Company on the lands aforesaid:

Fifth. Twenty (20) feet on each side of each section line east and west and north and south, through said lands, to be dedicated to the public as right of way for public highways; also, twenty (20) feet on the lower side of all canals and ditches and around all reservoirs herein mentioned, to be used by superintendents and workmen and others in repairing said canals, ditches and reservoirs, and in superintending the same. Also, one hundred and twenty-five (125) feet on either side of the section line east of the township line between ranges numbers twenty-one (21) and twenty-two (22), to be used by the Maxwell Land Grant Company as a cattleway; also, one hundred and twenty-five (125) feet of land on either side of the section line two (2) miles east of the township line dividing ranges numbers twenty (20) and twenty-one (21) east, to be used by the said company for the same purpose. Said cattleways run north and south, and are to run through any of the lands selected under this contract which may be located on said section lines:

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations not to be incorporated in deeds to purchasers under this contract shall be and forever remain to and with the said Maxwell Land Grant Company, without compensation from said company:

The right to graze on any and all the lands remaining unsold on both of the tracts referred to herein, viz., the tracts including one hundred and ten thousand (110,000) acres and the twenty thousand (20,000) acre tract:

27½ It being estimated that the capacity of the said irrigating system, ditching and reservoirs may ultimately be equal to serve thirty thousand (30,000) acres, it is hereby mutually agreed that the parties of the second part shall on or before the 1st day of October, A. D. 1889, have the option to select seven thousand (7,000) acres more of land from the adjacent unsold lands of the Maxwell Land Grant Company, suitable for irrigation, and if the parties of the second part shall exercise such option, then the party of the first part shall reserve such selected lands for the use of the parties of the second part upon the same terms as they take the lands under the said ditch system. Provided, if at the expiration of five (5) years from the date hereof, the parties of the second part shall elect to expend an additional sum of twenty-one thousand dollars ($21,000) in increasing the supply of water service of said system, by the building of storage reservoirs on the upper courses of the streams, or by other methods equally serviceable and mutually approved by the parties hereto, then said parties of the second part shall have said seven thousand (7,000) acres of land, and otherwise not:

And, it is further mutually agreed, that every purchaser of land under said ditch system, shall have conveyed to him by proper certificate of ownership, a perpetual right running with the land pur-

chased in the canals, ditches and reservoirs of said system in such proportion as thirty thousand (30,000) acres bears to the whole water supply, (it being estimated that thirty thousand (30,000) acres may be the ultimate capacity of said ditch system), that is, if such purchasers should buy one hundred acres of land he would be entitled to a one three-hundredth ($\frac{1}{300}$) part of all the water, and a like interest in all the plant, of said system, except that the ice which may form upon said reservoirs, is hereby forever reserved, to the parties of the first and second part-, in equal shares, which mutual reservation shall also be incorporated in the deeds to all the purchasers:

And, it is further mutually agreed, that all purchasers of land under said ditch system, be further required to pay in the proportion specified in the last preceding paragraph all repairs on said canals, ditches and reservoirs as the same may be from time to time required for the perfect maint*ai*nance and the preservation of such canals, ditches and reservoirs, and also to pay all taxes, in the same proportion, that may be lawfully assessed upon the said canals, ditches and reservoirs, and the right of way and the franchise thereof, if in law any such taxable franchise shall be found to exist:

And, it is further agreed, between the parties hereto, that such purchasers shall not receive their certificate, or be entitled to vote their interest in said ditch system, until their land shall be fully paid for.

28 And, it is further agreed between the parties hereto, that if the construction of the canals, ditches and reservoirs mentioned, should at the completion be found to cost less than sixty thousand dollars ($60,000), and that after such complete construction it should be satisfactorily shown that these canals, ditches and reservoirs were of insufficient capacity to give water service for twenty-two thousand (22,000) acres, within three (3) years after such complete construction, then the parties of the second part, shall invest such unused part of the said sixty thousand dollars ($60,000), in constructing such further ditches, reservoirs or reinforcements to the same as may be necessary to bring the whole of the twenty-two thousand (22,000) acres under sufficient irrigation:

(5.) As to the one hundred and ten thousand (110,000) acres, more or less, of unsold lands embraced within the boundaries hereinbefore described, in consideration of the agreements and obligations of the parties of the second part hereinafter contained, it is covenanted and agreed on the part of the party of the first part, that he will set over and deliver, and he does hereby set over and deliver, to the parties of the second part, the said one hundred and ten thousand (110,000) acres, more or less, except such part thereof, as may come under the said ditch system, and be selected by the parties of the second part, as provided in the first section of this contract, for the sale upon the terms and conditions hereinafter stated, and in consideration of the covenants and agreements contained in the last preceding paragraph, and hereinafter contained, on the part of the party of the first part, the parties of the second part hereby covenant and agree that they will use their best endeavors to sell and dispose of said one hundred and ten thousand (110,000)

acres, more or less of land, less the exception therefrom aforesaid, and that they will immediately upon the execution of this contract, set about, and undertake the sale and disposal of said last-mentioned lands, and that hereafter they will continue to contribute their best efforts, skill and ability so to do, until the whole of said lands are entirely sold and disposed of, as best may be under the following terms, conditions and restrictions, that is to say:

The average grade price per acre of all of the lands south of the north line, of township number twenty-six (26) running east and west, through said one hundred and ten thousand (110,000) acre tract, shall not be less than two dollars and fifty cents ($2.50) per acre, and the average grade price per acre of all the lands north of said north line of said township, shall not be less than three dollars ($3.00) per acre, and out of the proceeds of all said sales, the party of the first part, shall at the time of each sale receive the average grade price of the particular tract out of which the particular sale is made, and one half (½) of the gross sum realized
29 above these average grade prices, and the parties of the second part shall also at the time of each sale, receive and have to and for their own exclusive use and benefit the other one-half (½) part of said gross sum above said average grade prices realized from such sales; and if said tracts of lands shall be subdivided and sold in small tracts (as it is understood will be done so far as may be practicable and consistent with the objects of this contract), the prices per acre are to be so averaged and placed on the uplands and on the bottom lands of said two last-named tracts, severally, that the said party of the first part, will be enabled to realize the said average grade prices on said tracts, severally excepting such portion or portions thereof, as may be under said ditch system, and selected by the parties of the second part, under the first section of this contract; and if the better subdivisions of said tracts of land shall first be sold and disposed of, it shall be at prices sufficiently in advance of said several average grade prices, so as to insure the sale of the remaining and poorer subdivisions, or portions of said several tracts at a price that will realize to the party of the first part, said average grade prices severally: and the lands in said several tracts, shall be sold free and clear of all liens and incumbrances for cash in hand, or part cash and the balance in deferred payments, bearing interest at the rate of seven (7) per cent. per annum, by good and sufficient deeds in fee-simple with full covenants of warranty, and taking from the purchasers promissory notes for said deferred payments with interest at seven (7) per cent., and a trust deed with full powers of sale, securing such notes, the same in detail as is provided for as to the sale of the lands under the said ditch system mentioned in the first section of this contract; the deeds to such purchasers to be duly executed and delivered by the said party of the first part to the purchasers at the time of payment of the purchase price in cash, or in part cash, which said part cash however, shall never be less than one-fifth (⅕) of the whole of the purchase-money, and part notes secured by trust deeds as aforesaid, and the proceeds of such sales shall be distributed among and

delivered to the parties of the first and second parts both as to the cash payments and deferred notes in proportion to the interests of the parties hereto in each sale, that is, if one-fifth ($\frac{1}{5}$) part of the purchase-money be paid in cash, then one-fifth ($\frac{1}{5}$) of the average grade price of the tract out of which said sale shall be made, shall first be delivered out of said cash payment to the party of the first part, and the balance then be equally divided, and if the remainder be in ten (10) payments by note, one-tenth ($\frac{1}{10}$) of the remaining four-fifths ($\frac{4}{5}$) of said average grade price or premium sum and one-twentieth ($\frac{1}{20}$) of the remaining unpaid profits shall be put in each of the annual notes to be delivered to the party of the first part, and a series of annual notes shall be delivered to the parties of the second part, each note representing one-twentieth ($\frac{1}{20}$) part of the total of the unpaid profits: And it is hereby mutually agreed between the parties hereto that the person or persons who may be chosen as trustee or trustees under the provisions of this contract as to the lands under said ditch system, shall by virtue of such choosing and appointment be and act as the trustee or trustees for the trust deeds taken from the purchasers of the lands embraced in this section of this contract: And it is further mutually agreed between the parties hereto that the party of the first part shall pay all taxes that may be assessed upon all unsold portions of said tract of land, and that he will bear all necessary expenses of litigation in protecting the said tract of land from encroachment by trespass or by squatters, under whatever right they may claim, and in maintaining the purchaser or purchasers of the same or any part thereof, in full and peaceable possession and complete title of the same, so that possession and title can be given to the purchaser or purchasers free from any lien or incumbrances whatsoever: And the parties of the second part shall in no event become purchasers of said lands or any part thereof, directly or indirectly without the written consent of the party of the first part first had and obtained:

And it is further mutually agreed between the parties hereto, that the said parties of the second part shall bear all expenses of negotiating, disposing of and selling the said tracts of land and all portions thereof, including all expenses of subdividing in smaller tracts than one hundred and sixty (160) acres, of traveling, advertising, commissions of sub-agents making contracts, and all other expenses incident to the sale of said lands:

And it is mutually agreed between the parties hereto, that in the event that the proceeds of the sales of said lands do not exceed five (5) per cent. in excess of said average grade prices per acre upon a fair average market value of all the lands in said tracts severally, then the party of the first part shall pay such five per cent. to the parties of the second part, upon all sales made at the expiration of each and every three (3) months from the date of this contract and during the continuance thereof, as the total compensation of the parties of the second part in the premises:

And it is further agreed between the parties hereto, that if it shall at any time clearly appear that the lands being sold are of a higher

value than the average of the whole value of the lands, the party of the first part shall have the right to withhold from the share of the parties of the second part a sum proportionately equal to what the average value of the remaining unsold lands may be, less than the total average premium price of the particular tract, of said two tracts, in which the sales are made; and the parties of the second part further agree that they will prosecute the sale of said lands vigorously and complete, and conclude the sale of the entire
31 tract at as early a day as practicable under the terms and conditions and restrictions imposed, and that the one-seventh ($\frac{1}{7}$) of the whole body of land in the two (2) tracts, or thereabouts, shall be sold each year, but in no case shall more than one-quarter ($\frac{1}{4}$) of the whole of said two (2) tracts be sold in any one year, and the entire tract be sold and disposed of within six (6) years from the date of this contract, and no part shall be sold at a price less than the market price of these or surrounding lands:

And it is further understood and agreed that to enable the parties of the second part to more effectually carry out the terms, conditions and spirit of this contract, they are hereby duly made, constituted and appointed the agents of the party of the first part to do and perform, in accordance with the terms of this agreement, any and all acts necessary to be done and performed in the premises, in order to carry out the stipulations and agreements herein contained to the true intent, meaning and spirit hereof, hereby confirming any and all acts they may do or cause to be done in conformity with the agreements herein contained:

It is understood and agreed that all the stipulations, covenants and agreements, herein contained and required of the said party of the first part, shall extend to and be binding upon the said party of the first part in his respective official or representative capacity, as also that of M. P. Pells as agent of the income bondholders of the Maxwell Land Grant Company, who approves this instrument, and each of them as herein recited, and shall also include, bind, extend to and mean, as well the said Maxwell Land Grant Company, and as well also the income bondholders of the said Maxwell Land Grant Company, and the heirs, executors, and administrators, successors and assigns of each of them, as fully and completely as if they had been fully mentioned along with the said party of the first part each time hereinbefore:

And wherever, in this agreement, the parties of the second part are mentioned it shall be held as well to refer to and to bind and be for the benefit of each and every one of the said parties of the second part, their heirs, executors, administrators, successors or assigns, the same as though they had been in each and every case hereinbefore specifically stated, and wherever the Maxwell Land Grant Company is mentioned herein it shall include its successors and assigns.

In witness whereof the said party of the first part, and also the said parties of the second part have hereunto set their hands and seals on the day and year first above written.

32 And afterwards, to wit, on the third day of the regular March term, A. D. 1891, of the district court, within and for the county of Colfax, the same being the 18th day of March, the following, among other proceedings, were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

It is ordered by the court that William E. Gortner, Esq., be and he hereby is appointed examiner in the above-entitled case,
33 to take the proofs and report the same to this court, with all convenient speed.

And afterwards, to wit, on the 8th day of the regular March term, A. D. 1891, of the district court, within and for the county of Colfax, the same being the 24th day of March, 1891, the following, among other proceedings, were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

Now come the defendants in the above-entitled cause, by their attorneys, Messrs. Long, Fort & Bunker, and file their cross-bill, which said cross-bill is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court, Fourth Judicial District of the Territory of New Mexico, Sitting within and for the County of Colfax, March Term, A. D. 1891.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

To the Honorable James O'Brien, chief justice or the supreme court of the Territory of New Mexico and *ex officio* judge of the fourth judicial district of said Territory:

Your orators, The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and The Springer Land Association, a corporation, respectfully represents unto your honor that heretofore, to wit, on the 30th day of June, A. D. 1890, the above-named complainant, Patrick P. Ford, filed in the fourth judicial district court, of the Territory of New Mexico, in chancery sitting, his bill of complaint, making parties thereto your orators, and also the Maxwell Land Grant Company, a corporation, Rudolph V. Martensen and Charles Fairchild, Nicholas Thuron, Samuel L. Parish, Martinus P. Pelts, Henry W. Porter and Frank Springer,

trustees of the said Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the *the* Maxwell Land Grant Company, averring, substantially, in said bill of complaint, that said Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William A. Comstock, on to wit: the 20th day of October, 1888, entered into a certain contract in writing, and that the Springer Land Association was an unincorporated body at that time; and alleging further, that under and by virtue of the said written contract, a copy of
34 which purports to be attached to the said bill of complaint, that the complainant, Patrick P. Ford, contracted to furnish all necessary tools and labor and to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, and alleging further that the said ditch is called "the Cimarron ditch," and is situate in Colfax county, Territory of New Mexico, and begins at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchison, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax, Territory of New Mexico, being in length about twenty-six miles; that the said ditch has appurten-t thereto, along its entire length, land, as passageway, about sixty feet in width; has also lateral ditches and reservoirs, and the land covered thereby, and also appurten-t to said ditch twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east; and sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east.

All of which ditch laterals, reservoirs and lands, as aforesaid, the said bill of complaint alleges are platted and laid out on the plan which is made a part of said bill.

The said Patrick P. Ford, in his said bill of complaint, further avers that he began the said work on the said ditch, on or before the 1st day of November, 1888, and prosecuted the same continuously until the 21st day of June, 1889, and alleges that at that last date he completed the said work, in substantial compliance with the said written contract.

He further avers that in the performance of the said work he was an original contractor, and that within ninety days after the completion of the same, as alleged by him, that he filed for record with the county recorder of Colfax county, in said Territory, a claim containing a statement of his demands, together with a description of the property to be charged with a lien, in accordance with the terms of an act of the legislature in such cases made and provided, and avers that said claim was verified by the oath of the said Patrick P. Ford, and filed for record, July 3rd, 1889, and recorded in Book "H" of the said recorder's office, pages 1 to 8. The said Patrick P. Ford further avers in said bill, that about the time of the

alleged commencement of the said work, that the Springer Land Association transferred unto the Springer Land Association, a corporation, duly organized under the laws of the Territory of
35 New Mexico, all their right, title and interest in and to the said work and to the ditch and land and accessories thereto.

That said Patrick P. Ford, in his bill of complaint further avers that the Springer Land Association, a corporation, became obligated to pay for all the work done and performed by said Patrick P. Ford, as alleged and described in his said bill of complaint, on and about said work; and further alleges, that the said Springer Land Association have and claim to have an interest in the land upon which said reservoirs and ditches are located, and upon the ditches and reservoirs, and upon the lands adjacent thereto, as herein first above described; and alleges and claims that the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents, was at the commencement of the said action due from the said Springer Land Association to the said Patrick P. Ford for work done under said contract, and for the further sum of three hundred and ninety dollars for extra excavating and hauling, alleged in said bill to have been ordered by the engineer in charge of said work, and to have been allowed by him in pursuance of the provisions of the said contract.

That the said Patrick P. Ford, in his said bill of complaint so filed as before alleged, further claims that the whole of the said sum is due from the said Springer Land Association, and claims that the said ditches, reservoirs and real estate hereinbefore described, are subject to a lien in their favor, for the whole of the said amount so alleged by him to be due, and claims and seeks to establish by such action that he holds a lien as original contractor, upon the whole of said reservoir and ditch system, and upon said real estate for said sum, and is seeking to prosecute his said action to final judgment and decree, and to procure a decree of this court establishing such claim as a lien, and decreeing a sale of the said ditch and reservoir system and real estate to make the money so by him alleged to be due.

Your orators further aver that the said Patrick P. Ford claims, by his speeches and declarations, gives out to the world and asserts openly, notoriously and publicly, that the paper so alleged by him to be filed is a lien upon all of said property, and that he intends to sell the same to make the said alleged lien, and has so given out and declared ever since he filed his said claim of lien.

Your orators further aver, that heretofore on, to wit, the 1st day of May, A. D. 1888, the Maxwell Land Grant Company was the owner of, and in possession of, all the real estate in the said bill of complaint so filed by the said Patrick P. Ford described. That said Maxwell Land Grant Company, at said last-mentioned date, acting therein by Harry Whigham, then receiver of the said Max-
36 well Land Grant Company, and M. P. Pells, then agent of the income bondholders of said company, made and executed a written contract with C. C. Strawn, W. L. Johnson, M. W. Mills, and such persons as they might associate with them, which said

contract is attached to this cross-complaint as a part thereof, and marked Exhibit "A." That said written contract contemplated and provided for the construction of the reservoir and ditch system referred to in the contract subsequently entered into by the said Springer Land Association and the said Patrick P. Ford, the same being the system referred to in the bill of complaint of said Patrick P. Ford.

Your orators further aver that after the making of the said written contract with the said Maxwell Land Grant Company, that for a good and valuable consideration paid therefor, your orators, The Springer Land Association, a corporation, became the owner of said contract, and succeeded to all the rights of the parties of the second part in said contract mentioned, and entitled to all the privileges, rights, benefits and profits in said contract provided for and contemplated. But the said Springer Land Association, corporation, succeeded to such rights for the use and benefit of said Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewkesbury, Frederick J. Eames and William A. Comstock, who all have a pecuniary interest, that said contract with said Maxwell Land Grant Company shall be carried out and performed, and also an interest in said contract with said Patrick P. Ford, and in the reservoir and ditch system in said contract mentioned. The parties to said contract and the terms thereof will more fully appear by reference to the said Exhibit "A," to which your orators pray leave to refer for more specific statement, that by virtue of said written contract the said Springer Land Association became entitled to construct large water reservoirs and maintain dams, embankments and ditches upon lands before that time owned by the said Maxwell Land Grant Company, and became the owner of certain rights and interests in the said real estate, as shown by said contract, and acquired the right to contract, sell and convey such lands upon completion and construction of such ditches, dams and reservoirs as in said contract contemplated. That it was contemplated by said contract, and the parties to the contract and your orators, and your orators intended, to construct large water reservoirs, dams and ditches, so as to bring certain large quantities of real estate on said Maxwell land grant provided for in said Exhibit "A," and therein mentioned under irrigation, to wit, thirty thousand acres of land. That the construction of said ditches and reservoirs was intended to and would have largely enhanced the value of such lands. That in pursuance of said contract with the said Maxwell Land Grant Company, and for the purpose of increasing the value of the land aforesaid, and to make the same quickly
37 salable, the said Springer Land Association, after it succeeded to such rights in said written contract, determined to construct upon said lands, such system of reservoirs, dams and ditches, and to maintain the same, and entered into a contract with the complainant in the said bill of complaint, who is made a defendant to this cross-bill, whereby the said complainant, Patrick P. Ford, agrees to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, being the reservoirs,

dams and ditches aforesaid, and to furnish all necessary tools and labor, and perform all work of every kind and character in and about said reservoirs, dams and ditches, in a thorough and workmanlike manner, and in full accordance with certain specifications attached to a written contract, entered into by and between the said Springer Land Association and the said Patrick P. Ford, a copy of which said written contract and specifications is attached to this cross-bill, and marked Exhibit "B," as a part of the cross-bill, and your orators ask leave to refer to the same for a more particular statement of said contract. That the said Patrick P. Ford signed said contract on the 26th day of October, 1888, and agreed to commence work upon said reservoir system within ten days after so signing the said contract, and to fully complete the said contract and construct said reservoirs and ditches on or before the 1st day of July, 1889; for such work said Springer Land Association, in said written contract, agreed to pay at the rate of eleven cents per cubic yard, without classification, at the times and in the manner as in said specifications set forth.

Your orators further aver that it was extremely important to them that said contract should be fully completed at the time named therein, and hereinbefore averred, and it was contracted by the parties that the time within which said contract was to be completed should be the essence of and the essential feature in said contract. It was further contracted and agreed in said writing that final payment of the amount ascertained to be due on the final estimate of the engineer referred to in said contract should be postponed, not due, and not be made by your orator until the said Patrick P. Ford had entirely relieved the said ditches, reservoirs and embankments from all liens and freed the same from all danger from liens and claims of every kind, through failure on his part to liquidate his just indebtedness as connected with said contract.

Your orators further aver, that the only reason which induced them to acquire the rights of and in said contract, with the Maxwell Land Grant Company attached to this cross-bill, and to undertake and enter into the contract with the said Patrick P. Ford, for the construction of the ditches, embankments and reservoirs contemplated and provided for in said Exhibit "B," was the
38 profits, which they would be able to make by the increased value of said lands, growing out of the construction and maintenance of said improvements, and in the sale of such lands and the division of the proceeds of sale, as provided for in said Exhibit "A;" that without such improvements the said lands were grazing lands only, and not profitable or valuable for agriculture, not salable or easily disposed of to purchasers; but by the construction of said system of reservoirs and ditches, and the maintenance of the same, a large part of said lands, to wit: thirty thousand acres would become irrigable lands, supplied with water from said system, profitable and valuable for agriculture, and would be in great demand and would sell readily, and yield to your orators large profits and income as the result of such sales, and it was for the purpose of placing said lands on the market and rapidly selling the same at

such advanced price and value that they acquired rights of, in and to said contract with the Maxwell Land Grant Company, and said contract with the said Patrick P. Ford, was entered into and said work undertaken; all of which facts were communicated to said Patrick P. Ford, and well known by him also from other sources before the said written contract marked "Exhibit B," was entered into and before the construction of the said work was commenced. It was fully made known to said Patrick P. Ford, before he entered into said contract, that if he failed to complete the same within the time agreed upon, that it would entail great loss and damage upon your orators, and it was further made known to him at the same time, that if he allowed subcontractors and persons performing labor for him, or furnishing materials for him, to file claims for liens upon said lands, either because of indebtedness existing against said Ford in favor of such persons for such work, labor and material, or because of any claim of such indebtedness, that it would so cloud and encumber the title to said lands as to destroy the sale thereof in market, and thereby greatly embarrass and damage your orators, and prevent the sales of real estate intended to be accomplished by means of said work. And so it was contracted by said Patrick P. Ford, as in the fifteenth specification of said contract set out, that he should not have and would not demand the last estimate made by the engineer, until he had entirely removed all liens and encumbrances and claims for liens arising out of work done by any subcontractor for him, or materials furnished by any subcontractor, and that final payment and payment of all final estimates should be deferred and postponed until he made said system and real estate wholly free from encumbrance.

Your orators further aver, that the said Patrick P. Ford failing to complete his said contract and failing to perform said work and labor as he had contracted to do, abandoned the same and left the country after he had performed a part of said contract, leaving a large number of persons who had performed work upon said reservoirs, ditches and systems, as subcontractors under said Ford, and who had furnished materials as such, claiming that said Patrick P. Ford, for such work and labor and material, was largely indebted to them therefor.

That said Patrick P. Ford wholly failed to settle with such persons, and to liquidate their claims, and by reason of such failure, claims of lien by a large number of persons performing labor and furnishing material in connection with said work, were filed in the office of the probate clerk of the county of Colfax, and Territory of New Mexico, in which said lands were situated, asserting and claiming liens upon said ditches, reservoirs and real estate, in the bill of complaint, by the said Patrick P. Ford described, and hereinbefore set out for and on account of such alleged work, labor and material, and thereby greatly encumbered and clouded the title of your orators to said real estate, and to its interest in the same, in such a way as to alarm purchasers, who otherwise would have purchased large tracts of said real estate, at sums largely in excess of the costs of the same to your orators, and thereby prevented your orators

from making such sale and the profits they would otherwise hav realized from the sale of such lands, if the said work had been com pleted by the said Patrick P. Ford, and he had kept said propert free from claims of lien and encumbrances, as he had contracte to do; and by reason of his said failure to perform said work, an to keep the said lands free from said liens and encumbrances, you orators have been damaged in a large sum, to wit, twenty thousan dollars.

Your orators further aver, that many of said persons so claimin to hold liens upon said ditches, reservoirs and real estate, com menced actions in the fourth judicial district court, sitting in an for the county of Colfax, to enforce against said real-estate claims o liens so filed, and in such actions asserted claims of lien against sai real estate, by reason of such alleged work and labor and materia in a large sum, to wit, the sum of seven thousand dollars. Althoug the said Patrick P. Ford was made a party to the said several action and fully knew of the same, he failed to enter appearance in any o said actions, or to settle with said parties, or liquidate the indebted ness alleged to be due, or to bring any action against said parties t remove such encumbrances and claimed liens from off such prop erty, and thereby to place the same in such condition as to enabl your orators to make sale thereof; but to the contrary, wholly neglected, failed and refused so to do, so that your orator was com pelled to appear in said actions and expend a great amount of time of the value, to wit, of one thousand dollars, and expend necessarily a large amount in solicitors' fees therein, to wit, the sum of on thousand dollars, in defending against said liens, and to pay 40 out and expend a large sum of money, to wit, the sum o twenty-five hundred dollars in settling, liquidating and ad justing a part of said claimed liens, so as to relieve said real estat from the cloud occasioned thereby, to that extent and in part.

Your orators further aver, that in all of said work, the sai Patrick P. Ford gave your orators no information or assistanc whatever. That actions are yet pending, founded on said allege liens, among others, an action by Henry Dargel, who claims a lie on said real estate by virtue of being a subcontractor under sai Ford; that in said action, he, the said Dargel, alleges that he entere into a contract with the said Patrick P. Ford to do certain excavat ing and embankment work, on the said irrigating system, and tha for certain of said work he was to receive eight cents per cubic yard and for certain other parts of said work he was to receive ten cent per cubic *yard*, and the said Henry Dargel further alleges in hi bill of complaint in said action, that he did work under his sai contract, for which he was to receive under the estimate of the engi neer in charge of said work, on the 10th day of January, 1889, fiv thousand nine hundred and thirty dollars, and alleges that of sai sum on the 28th day of February, 1890, there was due and unpai from said Patrick P. Ford, to him the sum of two thousand tw hundred and seventy-nine dollars; and for that amount and th interest thereon, the said Henry Dargel, by his said action to whic the said Patrick P. Ford is made a party defendant, is seeking t

have enforced and decreed a lien upon said ditches, reservoirs and real estate, and to have the same sold for said alleged and claimed liens. That the said Henry Dargel alleges in his said bill of complaint, that he did his said work strictly according to his said contract, and that the said Patrick P. Ford refused to pay him therefor, and in order to secure to himself the benefit of the lien laws of the said Territory of New Mexico, that he made, executed and recorded his notice of lien on the said irrigating system and real estate of your orators for said sum, and procured such notice to be recorded in the office of the probate clerk of said county of Colfax, on the 1st day of August, 1889, within sixty days after the completion of said work, and avers in his said bill of complaint in said action, that thereby a lien attached upon the said irrigating system and said real estate for the balance so claimed to be due.

Your orator-avers that the existence of the said action of the said Henry Dargel, in particular, and the assertion by him of his said claim of lien, has been, and now is, a great cloud and encumbrance upon the said property of your orator-, and has greatly prevented, and now does prevent, the sale of such real estate, and does yet so cloud and encumber said property.

Your orators further aver that they have no personal
41 knowledge of the state of accounts between the said Henry Darge- and the said Patrick P. Ford; and that they are informed and believe that it was the duty of the said Patrick P. Ford, under his said contract entered into with the said Springer Land Association, to make settlement with the said Henry Dargel, and make payment of such sum as might be found to be due to said Henry Dargel, and in the event of a disagreement of the said Patrick P. Ford and Henry Dargel, as to the amount so due, that it was the duty of the said Patrick P. Ford, by proper action, to remove said encumbrance and cloud upon your orators' real estate, before seeking or demanding payment for any final estimate made by the engineer in charge of said work.

And your orators further aver that all estimates made by the engineer in charge of said work prior to the final estimate, were long ago paid and discharged by the Springer Land Association, and that your orators should not be called upon or forced to pay such final estimate, for which alone the said Patrick P. Ford brought his said action, until the said claim of liens, clouds and encumbrances are wholly removed from your orators' said property.

Your orators further aver that the said Patrick P. Ford entered into some fraudulent arrangement or copartnership with Edwin H. Kellogg, the engineer in charge of said work, and by other false and fraudulent means unknown to your orators, and in collusion with the said Edwin H. Kellogg, as to the amount of work actually performed by said Patrick P. Ford, under said contract, and as to the completion of said work by him under said contract, and by such means procured the said Edwin H. Kellogg to make overestimates as to work done from time to time, and also a final estimate of the amount under said contract claimed to be due and unpaid to the said Patrick P. Ford, which said false and fraudulent estimate

showed an indebtedness from your orators, The Springer Land Association, on account of said work; but your orators are informed and believe and upon information charge the fact to be that the said Edwin H. Kellogg, at the time he made such final estimate, had entered into a conspiracy with said Ford to defraud and cheat your orators.

Your orators aver that by means of such false statements and representations, and other fraudulent acts unknown to your orators, the said Patrick P. Ford combined and confederated with the said Edwin H. Kellogg, and procured him to make a final estimate of said work, and to deliver the same to said Patrick P. Ford. That thereupon the said Ford, armed with such false and fraudulent estimate, demanded of the Springer Land Association payment of the same, well knowing that the same was unjust and not due to him, and upon refusal of said association to make such pay-
42 ment, he filed his said claim for lien hereinbefore referred to, and brought his said action to establish said lien, well knowing that the said Springer Land Association was in nowise indebted to him, and well knowing that the said Henry Dargel was making the claim hereinbefore referred to; and upen payment being refused, the said Patrick P. Ford filed his said bill of complaint heretofore mentioned for the sole and only purpose of forcing the Springer Land Association to make payment of the said estimate; the said bill of complaint, filed as hereinbefore averred, and the said action commenced as hereinbefore averred, by the said Patrick P. Ford, being for and to collect the said final estimate only.

Your orators further aver that at other and different times and by like fraudulent means, and by other fraudulent means unknown to your orators, the said Patrick P. Ford procured other and earlier estimates to be made by the said engineer, in excess of the amount due at the time of making the same, and that at the time of said final estimate so procured and made, the said Springer Land Association had greatly overpaid to said Patrick P. Ford for work done under said contract on said ditch system and reservoirs, so that at the time of the making of said final estimate nothing remained due and unpaid to the said Patrick P. Ford under said contract for or on account of any work by him done not included in said final estimate, or for or on account of any prior estimate.

Your orators further aver that the said Patrick P. Ford wholly failed to do and perform the work which he did do on said contract in a good and workmanlike manner, or cause the same to be so done, or in the manner provided for in said written contract, that he failed to dig the ditches of the depth, width or length in said contract called for; that he failed to make the various embankments of the height, depth, width or strength called for in said contract, and in no manner did the work as called for in said written contract, and never finished or completed the same at any time.

Your orators further aver that the said Springer Land Association, relying upon the said contract, and upon the completion of said work, expended a large amount of money in placing said land

upon the market for sale, in employing agents to make such sales, in advertising such ditch system, reservoirs and real estate, and in procuring special trains to run from the East to the town of Springer near which said lands are located, and procuring passage, transportation and railroad fares for persons desiring to look at and purchase said lands, to wit, the sum of five thousand dollars, upon the faith of said contract, and in the belief that the said work would be properly performed in the time named in said contract, and that all liens, claims of liens and encumbrances of every character would,

43 by said Patrick P. Ford, be removed from said ditch system and real estate, so that nothing would exist to embarrass said Springer Land Association in the sale and disposal of said lands.

Your orators further aver that by the means aforesaid large numbers of persons were induced to come long distances, from the East and elsewhere, to examine said lands, with a view to the purchase of different tracts of the same. And that the said Springer Land Association, through its agents, had actually sold to divers purchasers large tracts of said real estate, described in said bill of complaint, and other lands under said irrigating ditch, at a profit to them largely in advance of the original costs, to wit, at a net profit to the Springer Land Association of six thousand dollars, and said purchasers stood ready to pay the purchase price therefor at such profit, but were prevented and deterred from so doing by the failure of the said Patrick P. Ford to complete said ditch at the time specified in said contract and by his failure to keep said ditch system, reservoirs and real estate free from all claims of liens and unencumbered, as he had contracted in said written contract to do.

Your orators further aver, that large numbers of such persons, upon visiting said lands, at the town of Springer, or near there, were informed and became aware of the fact that the said liens of subcontractors and others were filed in said probate court, and were intended to be enforced against the said lands, and were thereby alarmed, caused and induced to refuse to carry out their contract of purchase, or to purchase said land, or any part thereof, so that the said Springer Land Association was in the manner aforesaid damaged in the sum of six thousand dollars.

Your orators further aver, that as a means whereby the more readily to make sale and disposal of the said real estate under said ditch system, that the said Springer Land Association, at great cost and expense to itself, to wit: ten thousand dollars, in the spring of 1890, established near the town of Springer, and adjacent to said reservoir system, a "model farm," of several hundred acres of land, under irrigation from said system, upon which they planted all kinds of grain and root crops, for the purpose of demonstrating to buyers of land that the soil of said real estate was first class in quality, and with a sufficient supply of water, that it would produce all kinds of crops abundantly, to the great profit of those who might buy such lands and cultivate the same. That said "model farm" produced abundantly, and said Springer Land Association kept a large number of employees whose sole duty it was to show pur-

chasers over the said land of the said irrigating system, and over said farm; that great numbers of persons were induced, thereby, to contract for the purchase of large tracts of said lands under said ditches, out of which purchases said Springer Land Association would and could have made large profit, but for the failure of the said party to purchase, by reason of the said liens and encumbrances. Such purchasers became alarmed, by reason of the existence of the said liens and claims and encumbrances, and refused, by reason thereof, to complete their contracts for purchase, alleging, as an excuse, that they feared complications and litigation by reason of such claimed liens and encumbrances on the said land.

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Your orators further aver, that in the manner aforesaid, the said Springer Land Association lost the sale of divers and sundry tracts of land contracted to be sold at a price largely in excess of the original purchase price, and so lost such profit, and has been greatly damaged, in a sum largely in excess of the value of any work done or caused to be done by the said Patrick P. Ford, after the estimate next before the last was rendered, and in excess of the value of the work contained in the last estimate and in excess of the amount of said last estimate, so that by reason thereof, nothing is due or owing to the said Patrick P. Ford for or on account of the work done by him under said written contract.

Your orators further aver, that they are informed and believe that the fifteenth specification of the said written contract, by its terms, postpones payment of the final estimate, until after the said Patrick P. Ford shall have removed all liens, claims for liens and encumbrances of any character, from said real estate, reservoirs and ditch system, growing out of and connected with work done for him, or materials furnished for him, by subcontractors, or others, and that the said Patrick P. Ford having failed to keep said reservoir system and real estate free from such liens, claims of lien and encumbrances, brought his said action, filed his said bill of complaint prematurely and before such last estimate was due or payable.

Your orators further aver, that the said actions so instituted by said Patrick P. Ford, said claim so filed by him as a lien upon said ditch systems and reservoirs, and his public declarations to hold such lien and enforce the same, constitute a cloud on the right, title and interest of the Springer Land Association in and to said ditches, reservoirs and real estate, to the great damage of said Springer Land Association, and prevents the sale of the said real estate lying under said ditch system.

Your orators further aver, that said ditches and reservoirs, if the same had been by said Patrick P. Ford constructed according to the said contract plans and specifications, would have been amply sufficient to bring under irrigation said thirty thousand acres of land, and would have made said lands quickly salable at prices so much in advance of the original purchase price to your orators as to have made to your orators a large net profit. And that if the said Patrick P. Ford had so completed said contract and performed said work, and kept

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said real estate, reservoir system and ditches free from liens, claimed liens and encumbrances, as he contracted to do, the purchasers of such land who had agreed with the said Springer Land Association to take conveyances of and pay for the same at prices affording said association a large profit, to wit: five thousand dollars, would have done so and were willing and ready to do so upon the performance of said work, and the removal of said liens, claims of liens and encumbrances; that the failure of the said Patrick P. Ford so to perform said contract, caused your orators to lose the benefit of contracts which your orators had already made with purchasers for the sale of such lands, and to lose the profits your orators could have made thereon, to their damage, five thousand dollars.

Your orators further aver upon information and belief, that they and the members of said The Springer Land Association, and the officers and stockholders of the Springer Land Association corporation, reside in the State of Illinois, and did so reside at the time when said contract- marked Exhibit "A" and Exhibit "B" were made and executed and entered into, and that both said contracts were made by agents of the said The Springer Land Association, unacquainted with Edwin H. Kellogg; that said Patrick P. Ford having knowledge that your orators were about to enter into said contract with the said Maxwell Land Grant Company, and intending and expecting to secure from the Springer Land Association, the construction of the reservoir and irrigating system contemplated in said contract Exhibit "A," in this cross-bill and expecting and intending to procure agents of the said The Springer Land Association, negotiating with the said Maxwell Land Grant Company in making said contract Exhibit "A," to agree to the selection of Edwin H. Kellogg as the engineer, as in said contract named, and either having already conspired and agreed with said Kellogg to unduly and wrongfully favor the said Patrick P. Ford, in the estimates thereafter to be made, and in the construction of the work on said reservoirs and ditches thereafter to be done, or intending so to conspire and agree with him, to enable the said Patrick P. Ford thereby to gain a wrongful and undue advantage over the said Springer Land Association in the execution of the work contemplated by said contract, and thereby procure from said association, pay to a large amount, for work never done, the said Patrick P. Ford conspired, confederated, arranged and agreed with certain persons and certain agents of his, whose names are to your orators unknown, to divide among them the receipts from said association on account of such contracts for such work under contracts as thereafter could be procured, and that they would by false and fraudulent means and representations, impose upon the said agent-
46 of the said The Springer Land Association, who were then and there negotiating in the making of said contract, Exhibit "A," who were to act as agents for said association in the letting, constructing and carrying on said contract, and especially in mak- the reservoir system aforesaid, and induce such agents of said association to consent that said Edwin H. Kellogg should be the engineer named in said contract Exhibit "A," and also the engineer

to subsequently, as such, control the work to be done in pursuance of said contract, and to make the estimates upon which payments would be made for the work so contemplated by the said contract Exhibit "A."

And your orators are informed and believe, and on such information aver, that to carry out such conspiracy that said Patrick P. Ford did procure his said co-conspirators and agents to frequently seek out the said agents of said The Springer Land Association engaged in the negotiations on behalf of said company, which finally resulted in said contract Exhibit "A," and in said contract with said Patrick P. Ford for the construction of said irrigating system, and misled such agents as to said Edwin H. Kellogg, and the said agents of said association being ignorant of the true character of said Edwin H. Kellogg, and of the said purpose and intention of said Ford, were informed by the said Patrick P. Ford and his said secret agents that said Kellogg was a thoroughly competent, fair and honest engineer, and said Ford and his said secret agents by their continuous efforts to that end, finally impressed upon the said agents of the said Springer Land Association the belief that said Kellogg was honest, just and competent, and thereby procured the said Edwin H. Kellogg to be named in said Exhibit "A," as the engineer to take charge of the said work, as stated in said contract, and to be agreed upon and accepted by said Patrick P. Ford and the agents of said The Springer Land Association as the engineer in charge in said written contract Exhibit "B" for the construction of said irrigating and reservoir system, all of which was procured to be done by said Patrick P. Ford and his said secret agents, as your orators are informed and believe, in collusion with each other and said Edwin H. Kellogg, to in some way and in some proportion to your orators unknown, share and divide amongst and with each other the money thereafter to be paid by your orators on account of said construction, and to procure false and fraudulent and wrongful estimates of such work, and thereby to fraudulently increase their gains and defraud your orators and said The Springer Land Association out of large sums of money.

Your orators further aver that in the manner and by the means aforesaid, as *guarantee*, are informed and believe the said Patrick P. Ford procured the said Edwin H. Kellogg to be accepted as such engineer, and procured all estimates heretofore made by such
47 Kellogg for work on said reservoir system, and procured the said contract for the construction of said system, attached to the bill of complaint in this case, and so your orators aver that said estimates and said last-mentioned contract should be set aside and held for naught, as having been fraudulently obtained.

Forasmuch, therefore, as your orator is without remedy in the premises, except by filing this his cross-bill in the said proceeding commenced by the said Patrick P. Ford, against your orators, and the other defendants in the said bill so filed by the said Patrick P. Ford, and to the end that the said Patrick P. Ford, who is hereby made party defendant to this cross-bill, may be required to make full and direct answer to the said —, but not under oath, the answer under oath

being hereby expressly waived, that an account may be taken by and under the direction of the court of the amount of work done and performed by the said Patrick P. Ford, under and by virtue of his said written contract of the amount paid to him by the said The Springer Land Association, on account of said work and labor, of the damage done to and accruing to your orators by reason of the facts in this cross-bill averred, of the claims for liens filed and pending as encumbrances upon said real estate, growing out of work performed for and material furnished to the said Patrick P. Ford, by said subcontractor and others.

Your orators pray that subpœna issue from this honorable court, directed to the said Patrick P. Ford, commanding him to be and appear before this honorable court on a certain day, and under a certain penalty therein to be fixed, then and there to answer all and singular the allegations, matters and things therein set forth. And to stand by and abide and perform such order and decree in the premises as shall seem meet and agreeable to equity and good conscience, provided the court shall determine such subpœna necessary or proper to issue; and if the court shall hold such writ necessary that he then be required to appear to this cross-bill.

And your orators further pray, that an account may be taken of the claims of lien filed against the said real estate in this cross-bill described, and of the liens and encumbrances claimed or existing thereon, by reason of work performed or materials furnished for said Patrick P. Ford, and in the construction of the said reservoir system as in this cross-bill referred to, and that the amount of such encumbrances, liens and claimed liens be fixed by a decree of this court, and the said Patrick P. Ford be decreed to completely remove the same so that said ditch system and reservoirs and real estate shall be free from encumbrances before he proceeds further with his said action, or such other order and decree relating to that subject as may be just and equitable.

48 Your orators further pray, that it may be decreed on the final hearing of this cause, that this action was prematurely commenced and the cause be dismissed. And, further decreed, that all the said ditches and reservoir system and real estate are free and unencumbered from any cloud or lien by reason of the filing of the said Patrick P. Ford of his said claim of lien, and by reason of the commencement of his said action, and that he be decreed to pay the Springer Land Association the damages by it sustained by reason of the wrongful acts of the said Patrick P. Ford in the cross-bill alleged.

LONG, FORT & BUNKER,
Solicitors for Defendants.

49 And afterwards, to wit, on December 29th, 1891, there was filed in said clerk's office the answer of Patrick P. Ford to the cross-bill in said cause, which said answer is in words and figures as follows, to wit:

Answer to Cross-bill.

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

In the District Court for the Fourth Judicial District, Territory of New Mexico.

PATRICK P. FORD }
vs. }
THE SPRINGER LAND ASSOCIATION *et al.* }

Comes now Patrick P. Ford, complainant in the above-entitled cause, and defendant as to the cross-bill filed therein by the cross-complainants, The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock and The Springer Land Association, a corporation, and for answer to said cross-bill, this cross-defendant now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in the said cross-bill contained, for answer thereto, or to so much thereof as this cross-defendant is advised, it is material or necessary for him to make answer to, answering says:

That he admits the filing of the original bill of complaint in this cause, and admits the averments thereof, substantially as alleged in said cross-bill, and admits that on or about the first day of May, 1888, the Maxwell Land Grant Company was the owner of and in possession of the real estate in the original bill of complaint of this cross-defendant described; and that at about the said date the said Maxwell Land Grant Company entered into the contract in said cross-bill set forth, and attached thereto as Exhibit "A," and that the Springer Land Association, a corporation, succeeded to the rights of the parties of the second part in said contract so marked Exhibit "A," but as to whether or not they so succeeded for the use and benefit of the said The Springer Land Association, Christopher C. Strawn, C. M. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames and William A. Comstock, or for any or either of them, or as to whether each or any of said parties has a pecuniary interest that said contract with said Maxwell Land Grant Company should be carried out and performed, or an interest in the contract with this cross-defendant for the construction of the reservoirs and ditch systems in said contract mentioned, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

This cross-defendant admits that the Springer Land Association entered into a contract with this cross-defendant, being the contract set forth in the original bill of complaint, and that the requirements of said contract are substantially as in said cross-bill alleged, and as more specifically set forth in Exhibit "B," attached thereto and made a part thereof.

Admits that under said contract this cross-defendant agreed to commence work upon said reservoir system within ten (10) days after the signing of said contract, and fully complete the said work of constructing said reservoirs and ditches in said contract described, on or before the first day of July, 1889, and that he was to receive therefor compensation at the rate of eleven cents per cubic yard without classification at the times and in the manner in said specifications set forth.

This cross-defendant denies that it was contracted or agreed in said writing that final payment of the amount ascertained to be due on the final estimate of the engineer referred to in said contract, should be postponed or not due, or should not be made by the cross-complainant, The Springer Land Association, until the said Patrick P. Ford, this cross-defendant, had entirely relieved the said ditches, reservoirs or embankments from all liens; but admits that it was in said contract provided, that "the amount" due the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work. That whether or not the only reason which induced the cross-complainants to acquire the right of, in and to said contract with the Maxwell Land Grant Company attached to said cross-bill, or to undertake or enter into the contract with this cross-defendant for the construction of the work contemplated and provided for in said Exhibit "B," attached to said cross-bill, was the profits which they would be able to make by the increased value in said lands, growing out of the construction or maintenance of said improvements, or in the sale of said lands, or the division of the proceeds of sale, as provided for in said Exhibit "A," this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same.

That as to whether or not the lands described in said Exhibit "A" would by reason of the construction of the improvements contemplated by said contract marked Exhibit "B," be in great demand or would sell readily, or yield to the cross-complainants' large or any profits or income as the result of such sales, or as
51 to whether or not it was for the purpose of selling said lands in the market, or rapidly selling the same at such advanced prices or value, that they, the said cross-complainants, acquired rights of, in or to said contract, with the Maxwell Land Grant Company, or that the contract with this said cross-defendant for such purpose, was entered into or said work undertaken, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant denies that such alleged facts were communicated to him, or well known by him, from other sources or from any source, before the said written contract marked Exhibit "B," and attached to said cross-bill, was entered into, or before the construction of said work was commenced.

And this cross-defendant denies that it was fully made known to

him before he entered into said contract, that if he failed to complete the same within the time agreed on, it would entail great loss and damage upon the cross-complainants; and denies that it was further made known to him at the same time or at any time, that if he allowed subcontractors, or persons performing labor for him, or furnishing materials to him, to file claims for liens upon said lands, either because of indebtedness existing against said Ford, and in favor of said persons for such work, labor or material, or because of any claim of such indebtedness, that it would so cloud or encumber the title to said lands as to destroy the sale thereof in market, or thereby greatly embarrass or damage the cross-complainants, or prevent the sales of real estate intended to be accomplished by means of said work: And this defendant denies that it was so or at all contracted by said cross-defendant, that he should not have or would not demand the last estimate made by the engineer until he had entirely removed all liens or encumbrances or claims for liens arising out of the work done by the said subcontractors for him, or any material furnished by any such subcontractor or that it was by said contract agreed that final payment or payments of all final estimates should be deferred or postponed until he made said system or real estate wholly or at all free from encumbrances.

And this cross-complainant denies that he failed to complete his said contract, or that failing to perform said work or labor as he had contracted to do, that he abandoned the same, or that he abandoned the same at all, or that he left the country after he had performed a part of said contract, or that he left a large number of persons who had performed work upon said reservoirs, ditches and systems as subcontractor under him, or who had furnished materials as such, claiming that he, the said cross-defendant, for such work or labor or material, was largely indebted to them therefor, except as hereinafter specifically stated and admitted.

52 And this cross-defendant further alleges, that as to whether or not claims of liens by a large or any number of persons performing labor or furnishing material in connection with said work, were filed in the office of the probate clerk of the county of Colfax, Territory of New Mexico, in which said lands were situated, asserting or claiming liens upon said ditches, reservoirs and real estate described in plaintiff's bill of complaint, for or on account of such alleged work, labor or material, or that thereby the title of the cross-complainant was greatly encumbered or clouded as to such real estate, or to their interests in the same this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant alleges upon information and belief, that no such liens or claims of liens by any subcontractors under him, were filed in the office of the probate clerk of the county of Colfax and Territory of New Mexico, within the period of time fixed by the statute of the Territory of New Mexico relating to the filing of liens of subcontractors, and that no valid lien, except the lien of this cross-defendant, has at any time been filed or has existed against

the said ditches, reservoirs and lands in the plaintiff's original bill of complaint described.

That as to whether or not said alleged liens of subcontractors were filed or claimed in such a way as to alarm purchasers and others who would have purchased large or any tracts of said real estate, at sums largely or at all in excess of the cost of the same to the cross-complainants, or that thereby the cross-complainants were prevented or were in any manner prevented, from making such sales, or any sale, or the profits, or any profits they would otherwise have realized from the sale of said lands, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and therefore denies the same.

And this cross-defendant denies that by reason of any failure on his part to perform said work, or to keep the said lands free from said alleged liens or encumbrances, the complainants have been damaged in a large sum, to wit: twenty thousand dollars ($20,000), or in any sum whatsoever.

And this cross-defendant denies that he has been made a party to any of the said several actions alleged to have been brought by persons claiming to hold liens upon said ditches, reservoirs or real estate, in the fourth judicial district sitting in and for the county of Colfax, or elsewhere, to enforce against said real estate claims of liens so filed; and on the contrary alleges that he has not been served with process or cited to appear in any such action whatsoever.

That as to whether or not the cross-complainants, or any of
53 them, have been compelled to appear in said alleged actions, or to expend a great amount of time of the value of one thousand dollars ($1,000), or of any value whatsoever, or to expend a large or any amount in solicitors' fees therein, in defending against said liens, or pay out and expend any sum of money whatsoever in settling, liquidating or adjusting any portion of said claimed liens so as to relieve the real estate from the cloud occasioned thereby to any extent or any part, this defendant has not and cannot obtain sufficient knowlege or information upon which to base a belief, and denies the same.

This cross-defendant further alleges that in making these contracts with the several subcontractors, being the subcontractors mentioned in the cross-complaint, it was in each of said subcontracts stipulated and agreed as follows: "The estimate for the work of each calendar month will be paid by the company on or before the 10th of the month following that in which the work is done. As soon as such estimate is paid, the said party of the second part will pay to the said subcontractor the amount of his several estimates, less ten (10) per centum retained as detailed in the specification. It is mutually agreed that the amounts of these several estimates will in nowise be demanded or paid in advance of the payment of the regular estimate." That the company therein mentioned was the cross-complainant, The Springer Land Association, and that the party of the second part mentioned in said subcontracts was this cross-defendant. That the terms of said several subcontracts, and

the fact that the amount of subestimates was not payable in advance of the payment by the cross-complainants of this cross-defendant's estimates was well known to the cross-complainants at the time of the doing of said work, and long before the commencement of this action. And this cross-defendant alleges that on the first day of May, 1889, there was furnished to this cross-defendant by one Edwin H. Kellogg, the engineer of the cross-complainants, and who is the engineer referred to in the contract between the Springer Land Association and this cross-defendant, as the engineer for said company, an estimate showing the amount of work performed under this cross-defendant's contract during the month of April, which, after deduction of ten per centum as provided in said contract, left an amount due under said estimate to this cross-defendant, of the sum of five thousand and ten dollars and ninety-two cents ($5,010.92); which, by the terms of said contract, was due and payable to this cross-defendant by the cross-complainant, on or before the 10th day of May, 1889: That under the said several contracts with subcontractors, being the contracts referred to in the cross-bill, no sum was due to said subcontractors from this cross-defendant until the cross-complainants should have paid to this cross-defendant the said sum of five thousand and ten dollars and ninety-two cents
54 ($5,010.92): That said cross-complainants have not paid at any time said sum of five thousand and ten dollars and ninety-two cents, or any portion thereof, and that the same still remains due and payable, and that if any liens have been filed by said subcontractors against the premises in the cross-bill and in the original bill of complaint described, the same was caused solely by the failure of the said cross-complainants to pay to this cross-defendant the said estimate of five thousand and ten dollars and ninety-two cents ($5,010.92), as aforesaid.

This cross defendant alleges that whether or not the existence of the action in said cross-bill mentioned of Henry Dargel, and the assertion by him of his claim of lien, has been or now is a great or any cloud or encumbrance upon the property of the cross-complainants, or whether the same has greatly or at all prevented, or does now prevent the sale of real estate, or constitutes any cloud upon or encumbrance upon said property, this cross-defendant has not sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant alleges, that any claim of lien asserted by the said Henry Dargel against the premises in the cross-bill, or in the original bill described, and interest based thereon, is caused solely by the failure of the cross-complainants to pay to this defendant, in accordance with the terms of the contract, marked Exhibit "B," and attached to the cross-bill, the amount due to this cross-defendant on the 1st day of May, 1889, being the said sum of five thousand and ten dollars and ninety-two cents ($5,010.92), and on account of the further failure of the said cross-complainants, as hereinafter more specifically alleged, to pay to this cross-defendant the final estimate, to wit: the sum of twelve thousand six hundred

and twenty-five dollars and fifty-three cents ($12,625.53), due and payable from the said cross-complainants to this cross-defendant.

And this cross-defendant denies that all estimates given by the engineer in charge of said work, prior to the final estimate, were long ago or at any time paid or discharged by the Springer Land Association, or that the cross-complainants should not be called upon or forced to pay such final estimate until the said claim of liens, clouds and encumbrances asserted by said subcontractors, as in said cross-bill alleged *or* wholly removed from the cross-complainants' property; and, on the contrary, this cross-defendant alleges that the sixth estimate furnished to this defendant by the engineer in charge of said work, the same being the estimate prior to the final estimate, and amounting as hereinbefore mentioned, to five thousand and ten dollars and ninety-two cents ($5,010.92), was never at any time paid to this cross-defendant by the said The Springer Land Association.

55 This cross-defendant further denies, that he ever at any time entered into any fraudulent arrangements or copartnership, or any arrangements or copartnership, with Edwin H. Kellogg, the engineer of said work, in the cross-complaint and in the original bill of complaint described, or that he by any other false or fraudulent means, either known or unknown to the cross-complainants, or in collusion with the said Edwin H. Kellogg, as to the amount of work actually performed by the said cross-defendant under this contract, or as to the completion of said work by him under said contract, or by any means whatsoever, procured the said Edwin H. Kellogg to make overestimates as to the work done from time to time, or any final estimate of the amount under said contract claimed to be due or unpaid to this cross-defendant, or that any fraudulent or false estimate was made showing an indebtedness from the cross-complainants, or any of them, on account of said work; and denies that the said Kellogg at the time of making his final estimate, or at any other time, had entered into a stipulation with this cross-defendant to defraud or cheat the cross-complainants.

This cross-defendant denies that he by means of any false statements or representations, or any fraudulent acts whatsoever, or in any other manner whatsoever, combined or confederated with the said Edwin H. Kellogg, or procured him to make a final estimate of said work, or to deliver the same to this cross-defendant. Admits that this cross-defendant demanded of the Springer Land Association payment of a final estimate furnished to him by the said engineer, being the engineer of the cross-complainants; but denies that said estimate was false or fraudulent, or that said demand was made by this cross-defendant with knowledge that the same was unjust or not due to him; and on the contrary, alleges that the said final estimate was just and due, and is now due, and owing to this cross-defendant. Admits that upon the refusal of said The Springer Land Association to make the payment of said final estimate, he filed his said claim for lien and brought this action to establish said lien; but denies that at the time of so doing he knew that the said

The Springer Land Association was in nowise indebted to him, and on the contrary, alleges that at the time of filing said lien, the said The Springer Land Association was largely indebted to this cross-defendant in the full sum of seventeen thousand and six hundred and thirty-six dollars and forty-five cents ($17,636.45).

And this cross-defendant denies that his said action, being the action brought by the original bill filed in this case, was for and to collect the said final estimate only; but alleges that the same is brought to collect the final estimate furnished to him by the said engineer, being, to wit: in the sum of twelve thousand six
56 hundred and twenty-five dollars and fifty-three cents ($12,625.53), and also to recover a previous unpaid estimate to the amount of five thousand and ten dollars and ninety-two cents ($5,010.92).

The cross-defendant further denies that at other or different times, or at any time, by any fraudulent means whatsoever or in any manner whatsoever, the said cross defendant procured other or earlier or any estimates to be made by the said engineer in excess of the amount due at the time of making the same; and denies that at the time of said final estimate, the said The Springer Land Association had greatly overpaid him, the said cross-defendant, for work done under said contract on said ditch system and reservoir; and denies that at the time of making said final estimate, anything remained due or unpaid to the said cross defendant under said contract, for or on account of any work by him done, not included in said final estimate, or for or on account of any other prior estimate; but, on the contrary alleges, as hereinbefore stated, that there was, at the time of rendering said final estimate, due not only the amount of said final estimate, but also, the amount of the last estimate previous thereto.

This cross-defendant denies that he failed to do or perform the work, which he did do under said contract, in a good or workmanlike manner, or to cause the same to be done, or in the manner provided for in said written contract; and denies that he failed to dig the ditches of the depth, width or length in said contract called for. Denies that he failed to make the various embankments of the heighth, depth, width or strength called for in said contract; and on the contrary, alleges that he, in every respect, performed said work, and caused the same to be performed in accordance with said contract and the specifications attached thereto, and in accordance with the directions of the engineer in charge of said work.

That whether or not the Springer Land Association, in reliance upon said contract, or otherwise, or in reliance upon the completion of said work, expended a large amount of money in placing said land upon the market for sale, or in employing agents to make such sales, or in advertising said ditch system, reservoirs or real estate, or in procuring special trains to be run from the East to the town of Springer; or procuring passage, transportation or railroad rates for persons desiring to look at or purchase said lands, or that whether such expenditure was in the sum of five thousand dollars ($5,000), or in any sum whatsoever, or whether the same was made upon the

faith of said contract, or in the belief that the work would be properly performed in the time named in said contract, or that all liens, claims of liens or encumbrances of every character would by the cross-defendant be removed from said ditch system or real estate, so that nothing would exist to embarrass said The Springer
57 Land Association in the sale or disposal of said lots, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

That as to whether or not, by the means in said cross-bill alleged, or by any other manner whatsoever, large or any numbers of persons were induced to come long or any distance from the East or elsewhere to examine said lands, with the view to purchase of large or any tracts of the same, or as to whether the said The Springer Land Association, through its agents, or otherwise, had actually sold to divers or any purchasers large or any tracts of said real estate described in said bill of complaint, or other lands under said irrigating ditch, at a profit to them largely or at all in advance of the original costs, or to a net profit to the Springer Land Association of six thousand dollars, or any sum, whatsoever, or as to whether such purchasers stood ready to pay therefor at such profit, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

And this cross-defendant denies that such purchasers were prevented from making such alleged purchases, or deterred therefrom, by any failure of this cross-defendant to complete the said ditch at the time specified in said contract, or by his failure to keep said ditch system, reservoirs or real estate, free from all or any claims of liens or encumbrances, and that, on the contrary, the existence of any such liens was due solely to the failure, on the part of the cross-complainants to pay to this defendant the amount due to him under his contract, as hereinabove set forth.

That as to whether or not a large or any number of persons, upon visiting said lands, at the town of Springer, or elsewhere, were informed or became aware of the fact that the said liens of subcontractors and others were filed in the probate court or were intended to be enforced against the said lands, or as to whether such persons were thereby alarmed, caused or induced to refuse to carry out their contracts of purchase, or to purchase said lands, or any part thereof; or whether the said The Springer Land Association was in the manner aforesaid, or in any manner, damaged in the sum of six thousand dollars ($6,000), or in any other sum whatsoever, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

This cross-defendant further alleges that as to whether as a means whereby the more rapidly to make sale and disposal of said real estate under said ditch system, the Springer Land Association, at an expense of ten thousand dollars ($10,000), or of any other
58 sum, established near the town of Springer, a model farm, and as to whether or not they planted all kinds of grain or root crops thereon for the purpose of demonstrating to buyers of land that the soil of said real estate was first class in quality, or that

with a sufficient supply of water it would produce all kinds of crops abundantly, or otherwise, to the great profit of those who might buy such lands or cultivate the same, and as to whether or not said model farm did produce abundantly, or as to whether said The Springer Land Association kept a large or any number of employees, whose sole duty it was to show purchasers over said land or over said farm, or as to whether or not a great number, or any number of persons were induced thereby to contract for the purchase of large or any tracts of land under said ditches, or whether or not out of said purchases said The Springer Land Association would or could have made large or any profit but for the failure of said proposed purchasers to purchase by reason of said liens or encumbrances, or as to whether or not such purchasers became alarmed, by reason of the existence of said alleged claims or liens or encumbrances, or refused, by reason thereof, to complete their contracts for purchase, or as to whether or not said purchasers alleged as an excuse that they feared complications or litigation by reason of such claimed liens or encumbrances upon said land, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

That as to whether or not the said The Springer Land Association lost the sale of divers or any tracts of land contracted to be sold at prices largely or at all in excess of the original purchase price, or so lost profit, or has been greatly or at all damaged, or in any sum largely or at all in excess of the value of any work done or caused to be done by this cross-defendant after the estimate next before the last was rendered, this cross-defendant has not, and cannot, obtain sufficient knowledge or information upon which to base a belief. But this cross-defendant denies that by reason thereof, or from any cause or reason whatsoever, there is now nothing due or owing to him, the said cross-defendant, on account of the work by him done under said written contract, but alleges that there is due to him the full sum of seventeen thousand six hundred and thirty-six dollars and forty-five cents ($17,636.45), as hereinbefore alleged.

This cross-defendant denies that the fifteenth specification of the said written contract, by its terms or otherwise, postpones payment of the final estimate until by this cross-defendant shall be removed all liens, claims of liens or encumbrances of any character from said real estate, reservoirs or ditch system, growing out of or connected with the work done for him or material furnished for him by sub-contractors, or others; and denies that he filed his bill of
59 complaint herein prematurely, or before his last estimate was due or payable; and alleges that any failure on the part of him, said cross-defendant, to keep such reservoir system and real estate free from liens, claimed liens or encumbrances, is due solely to the failure on the part of the cross-complainants to pay this cross-defendant the amounts due him under this contract, as aforesaid.

This cross-defendant further alleges that said ditches and reservoirs, so far as work by him contracted to be performed is concerned, were constructed according to said contract, plans and specifications, but as to whether or not, being so constructed, the said ditches and

reservoirs were or would have been sufficient to bring under irrigation thirty thousand (30,000) acres of land, or whether or not the same did or would have made lands quickly salable at prices so much in advance of the original purchase price to the cross-complainants as to have made said cross-complainants a large or any net profit, this cross-defendant has not, and cannot, obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not, in the event that said premises had been kept free from liens, claimed liens or encumbrances, purchasers who had agreed with the Springer Land Association to take conveyances of, or pay for the same, at prices affording said The Springer Land Association a large or any profit, being to wit, the sum of five thousand dollars ($5,000), or to any other sum, would have done so, or were willing and ready to do so upon the performance of said work or removal of said liens, claims of liens or encumbrances, this cross-defendant has not, and cannot, obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defe[illegible]ant alleges that any failure of purchasers of said land to so tak[illegible]nd pay for the same was not due to failure on the part of this c[illegible]s-defendant to fully perform said work, and denies that any failu[illegible]on the part of this cross-defendant so to perform his said contract, caused the cross-complainants to lose the benefit of any contracts made by them with purchasers for the sale of lands, or to lose the profits which they could have made thereon, to their damage in the sum of five thousand dollars ($5,000), or in any other sum whatsoever.

That as to whether or not the cross-complainants, or the members of the Springer Land Association, or the officers or stockholders of the Springer Land Association, a corporation, or as to whether or not any or either of them were at the time of executing the contracts marked Exhibit "A," unacquainted with Edwin H. Kellogg, this defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief; but this defendant denies that said officers and cross-complainants were unacquainted
60 with said Kellogg at the time of executing the said contract marked Exhibit "B;" and on the contrary alleges that certain of the cross-complainants, to wit: Christopher C. Strawn and Melville W. Mills, were acquainted with the said Edwin H. Kellogg for many months prior to the execution of the contract marked Exhibit "B." and attached to the cross-bill, being the contract between the Springer Land Association and this cross-defendant.

This cross-defendant denies that he had knowledge that the cross-complainants, or any of them, were about to enter into said contract with the Maxwell Land Grant Company, and denies that at the time of the making of the said contract marked Exhibit "A," and attached to the cross-bill, this cross-defendant intended or expected to secure from the Springer Land Association the construction of the reservoir or irrigating system contemplated in said contract marked Exhibit "A," attached to said cross-bill, or that he expected or intended to procure the agents of the said The Springer Land

Association negotiating with said Maxwell Land Grant Company in making said contract, marked Exhibit "A," and attached to the cross-bill, to agree to the selection of Edwin H. Kellogg as the engineer to be named in said contract; and denies that he had then or did ever at any time conspire or agree with said Kellogg to unduly or wrongfully, or at all favor this cross-defendant in estimates thereafter or at any time to be made, or in the construction of said work on said reservoirs and ditches thereafter to be done, or that he intended to, or ever at any time did conspire or agree with the said Kellogg to enable the cross-defendant thereby or in any manner whatsoever to gain any wrongful or undue advantage, or any advantage whatsoever, over the said The Springer Land Association in the execution of the work contemplated by said contract, or in any other manner or matter whatsoever, or thereby to procure from said The Springer Land Association pay to a large or any amount for work never done. And denies that this cross-defendant conspired, confederated, arranged or agreed with certain or any persons, or secret or any agent, to divide among them, or with any person whatsoever, the receipts from said association on account of such contract for work; and denies that he ever at any time conspired or agreed with any person whatsoever by any false or fraudulent means or representations to impose upon any agent of the Springer Land Association in reference to the letting, constructing or carrying on of said contract, or in reference to making the reservoir system aforesaid, or in any other manner or matter whatsoever; and denies that he conspired or agreed with any one whomsoever to induce, or that he did induce such or any agents of said association to consent that said Elwin H. Kellogg should be the engineer named in said contract, marked Exhibit "A," and attached to the cross-bill, or that he should be the engineer to control the work to be done in pursuance of said contract, or to make
61 terms upon which payment should be made for the work so contemplated by said contract or in any other matter whatsoever.

This cross-defendant further denies that for the purpose of carrying out said conspiracy, or for any other purpose whatsoever, or in any manner whatsoever, he procured any co-conspirators or agents to frequently or at all seek out any agent or agents of said The Springer Land Association, engaged in negotiations on behalf of said company which finally resulted in said contract, marked Exhibit "A" attached to said cross-bill, or in said contract with this cross-defendant for the construction of said irrigating system, or engaged in any other negotiations whatsoever.

That as to whether or not the said agents of said association were ignorant of the true character of said Kellogg, this cross-defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief, and denies the same.

And this cross-defendant denies that the said agents or any agents of the cross-complainants, were informed by the said cross-defendant or by any secret or other agents of him, the said cross-defendant, that said Kellogg was a truly competent, fair or honest engineer;

and denies that he, the said cross-defendant, or any agent, secret or otherwise, of him, the said cross-defendant, by continuous or any effort to that end, finally or at all impressed upon the agents of the said The Springer Land Association, the belief that said Kellogg was honest, just or competent, or that he thereby or in any manner whatsoever procured the said Kellogg to be named in said Exhibit "A" attached to the said cross-bill as the engineer to take charge of said work so to be agreed upon and accepted as the engineer in charge in said written contract marked Exhibit "B," attached to said cross-bill, being the contract with this cross-defendant, for the construction of said irrigating and reservoir system; and denies that any of the matters or things aforesaid were procured to be done by this cross-defendant, or by any agent, secret or otherwise of his, in collusion with each other, or with said Kellogg, or with any other person whatsoever, for the purpose in any way, or in any proportion or upon any share whatsoever to divide among them, or with any other person whatsoever, the money thereafter to be paid by the cross-complainants on account of said construction, or to procure false or fraudulent or wrongful estimates of said work, or thereby to fraudulently increase their or his gain, or defraud the cross-complainants, or the said The Springer Land Association, or any other party whatsoever, out of large or any sums of money.

And this cross-defendant denies that he in any manner whatsoever procured the said Edwin H. Kellogg to be accepted as such engineer; and denies that by any of the means or devices or
62 in the manner set forth in said cross-bill he procured estimates to be made by said Kellogg, for work on said reservoir system, or thereby procured the contract aforesaid for the construction of said system; and denies that the estimates or said contract should be set aside or wholly for naught held as having been fraudulently obtained; and, on the contrary, this cross-defendant alleges that the said contract, marked Exhibit "B," and attached to the cross-bill, being the contract on which this action was originally brought by this cross-defendant as complainant, was entered into fairly and openly by and between this cross-defendant and the Springer Land Association, and that this cross-defendant has in all respects whatsoever, fully complied with the terms and conditions thereof, and has performed his work thereunder in obedience to the orders of the engineer selected and appointed by the complainants herein.

And this cross-defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said cross-bill charged, without this that there is any other matter, cause or thing in the said cross-complainants' said cross-bill contained material or necessary for this cross-defendant to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true, to the knowledge or belief of this cross-defendant; all which matters and things this cross-defendant is ready and willing to aver, maintain and prove, as this honorable court shall direct. And humbly prays to be hence dismissed as to said cross-bill, with his reasonable costs and charges in this behalf most wrongfully sustained; and prays that he may have judgment

against the cross-complainants, being defendants to his original bill of complaint, as in said bill of complaint prayed, and for his costs.

WOLCOTT & VAILE,
Solicitors for Patrick P. Ford, Cross-defendant.

UNITED STATES OF AMERICA, *District of Colorado.*

STATE OF COLORADO, }
County of Arapahoe, } ss:

Patrick P. Ford, being duly sworn, deposes and says: That he is the defendant to the cross-bill in the above-entitled cause, and that he has read the foregoing answer to said cross-bill, and knows the contents thereof; that the same is true, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

PATRICK P. FORD.

Subscribed and sworn to before me, this 26th day of December, A. D. 1891.

[SEAL.]

FRANCIS W. TUPPER,
Clerk Dist. Ct. U. S., Colo.,
By CHARLES W. BISHOP,
Deputy Clerk.

63 And afterwards, to wit, on March 24th, there was filed in said clerk's office a stipulation, which said stipulation is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

In the District Court of the Fourth Judicial District.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } No. 1301.

Stipulation.

64 It is hereby stipulated by and between the parties to the above-entitled cause, that the defendants shall complete taking their testimony upon the issues formed, as well upon the cross-bill as upon the original bill, on or before the evening of Thursday, March 24th, 1892; that the plaintiff shall have until May 20th thereafter within which to take his testimony in rebuttal, and that no evidence shall be taken in said cause subsequent to the 20th day of May, 1892, unless time is extended by the court, or judge, on cause shown, and that as early as practicable after the completion of testimony said cause shall be set down for final hearing and argument.

Replication by defendant to plaintiff's answer to the cross bill shall be considered as filed.

It is hereby further stipulated that an order of court may be forthwith entered in accordance with the terms of this stipulation, extending the time of defendants and cross-complainants for taking testimony until and including the 24th day of March, 1892, and the time of complainant and defendant to cross-bill for rebutting testimony until the said 20th day of May, 1892.

WOLCOTT & VAILE,
Solicitors for Plaintiff.
LONG & FORT,
Solicitors for Defendants.

And afterwards, to wit, on the 4th day of the regular March term, A. D. 1892, of the Colfax county district court, the same — March 24th, 1892, the following among other proceedings *being* were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

Come now, the parties in the above-entitled cause, by their counsel and file stipulations. It is thereupon ordered by the court that time for taking proofs be, and the same hereby is, extended according to the term of the stipulation.

65 And afterwards, to wit: on February 6th, there was filed in said clerk's office, by defendants' counsel, a motion to have said cause referred to a master, which said motion was in words and figures as follows:

66 In the District Court for the Fourth Judicial District of the Territory of New Mexico, Sitting within and for the County of Colfax.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.*

Comes now the defendant-, The Springer Land Association *et al.*, for whom Long & Fort appear, and show to the court that evidence in this case is very voluminous, consisting of about 1,600 pages, typewritten, and the question involved will necessarily require a careful reading of all the evidence to correctly understand the same; that W. E. Gortner was appointed, March 19th, 1891, examiner, but a master has never been appointed. That complainants have submitted to these defendants a proposition as to the time which should be properly consumed in the argument of the case, to properly present the same to the court, and such proposition is to commence the argument on Wednesday morning of this week, and to close the same at noon of Saturday, the time to be evenly distributed between the respective parties, complainant and defendant to the action; that these defendants believe the time named in said proposition to

be the least in which the case can be properly presented, and if any change should be made as to argument, that the time should be greater rather than less. That the reading of the testimony, along with the necessary exhibits in the cause, understandingly, so as to be able to comprehend the bearings of the various statements in evidence, and the weight to be attached to the same cannot be done in less than a week, and the cause cannot properly be considered without such reading. These defendants move the court to now refer the evidence in the cause to some capable and experienced master, to hear arguments, read and consider the evidence and report his conclusions as to the facts and law, to the court, at some early and convenient day, the argument to commence before such master, on Wednesday morning of this week.

Dated this 7th day of February, A. D. 1893.

LONG, FORT & TEWKSBURY,
Solicitors for Certain of the Defendants.

Which motion was denied, and defendants excepted to the ruling. And thereupon the court proceeded to hear the case, and the following evidence, heretofore taken, filed and published in said cause, was submitted to the court.

67 And afterwards, to wit: on the second day of the regular March term of the district court, within and for the county of Colfax, the same being Tuesday, March 28th, 1893, the following among other proceedings were had, to wit:

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery.

Comes now the complainant in the above-entitled cause by his solicitors and files findings of fact and conclusions of law, and a decree is also filed, which is in words and figures as follows, to wit:

TERRITORY OF NEW MEXICO, }
County of Colfax. }

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } No. 1301.

This cause having come on for final hearing before the court upon the bill of complaint, the answer thereto and the replication to such answer; and upon the cross-bill, the answer thereto and the replication to such answer; and upon the evidence taken by the parties, in support of their respective allegations; and the court having fully considered the issue joined between the parties, and the evidence adduced thereon and the arguments of counsel; the court doth now find the following facts, to wit:

I.

That on the 26th day of October, 1888, the defendant, The Springer Land Association, entered into a contract with the complainant, Patrick P. Ford, whereby the latter agreed to furnish all necessary tools and labor, and to perform all the work of grading required in the construction of the Cimarron ditch and its accessories, for which the said The Springer Land Association, agreed to pay to said Patrick P. Ford eleven cents per cubic yard, without classification; the work to be completed on or before the first day of July, 1889.

II.

By the specifications attached to said contract and made part thereof, it was provided, that monthly estimates should be made by the engineer of the Springer Land Association, on or about the first day of each month, of the quantity of material moved by the contractor during the preceding month; that the said engineer should certify the amount to the company, together with an account of the same at the price stipulated, which account should be audited by the company, without unnecessary delay and the amount thereof, less ten per cent. retained, should be paid to the contractor in cash, within ten days thereafter; and that the retained percentage
68 should be held by the company as a guarantee for the faithful completion of the work, and be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work.

III.

It was also provided in said specifications as follows:

"The amount due to the contractor under the final estimate will only be paid upon a satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work."

IV.

The specifications attached to said contract made a specific provision in reference to the embankment for reservoir No. 7, which, among other things, provided as follows:

"On the line marked for the top of the embankment, a trench 8 feet wide and 1 to 4 feet deep, will be excavated, the material being placed in the outer part of the embankment."

And also contained the following provision:

"All material put in this embankment will be borrowed from the inner or water side, leaving a berme of 25 feet from the toe. The price named for embankment will include the total haul, as no overhaul estimate will be made. The dimensions of this bank will be as follows: Width of top 12 feet; inner slope 3 feet horizontal to 1 foot vertical; the outer slope will be 1½ to 1; the greatest height of center line will be 26 feet."

Said specifications also provided as follows:

"All orders of the engineer, concerning any part of the work, must be promptly obeyed."

V.

By the terms of an agreement made on the first *of* day of May, 1888, between Henry Whigham, as receiver of the Maxwell Land Grant Company, approved by M. P. Pells, the agent of the income bondholders of said company, of the first part, and C. C. Strawn, W. J. Johnston, M. W. Mills and such other persons as they might associate with them, parties of the second part, it was provided, that the parties of the second part, or those who should be associated with them, should construct a system of ditches and reservoirs, including those afterwards described in the contract of the complainant with the defendant, The Springer Land Association, upon certain terms in said contract specified; whereby the said parties of the second part, in said contract of May 1st, 1888, were to receive an interest in the proceeds of certain lands situated under and in the vicinity of said system of ditches.

VI.

69 The defendant, The Springer Land Association, is the successor in interest to the said parties of the second part, in said contract of May 1st, 1888.

VII.

By the terms of said contract of May 1st, 1888, one E. H. Kellogg was designated as the engineer to have charge of the construction of said system of ditches and reservoirs.

VIII.

The complainant in this suit, Patrick P. Ford, was not a party to said contract of May 1st, 1888, and had no voice in the selection of said E. H. Kellogg as engineer.

IX.

Subsequent to October 26th, 1888, the complainant entered upon the performance of his contract for the grading for said Cimarron ditch and its accessories, including the said reservoir No. 7.

X.

The engineer in charge of said work, as the representative of the defendant, The Springer Land Association, was, throughout the period of construction of said ditches and reservoirs, E. H. Kellogg, the party designated as such engineer in said contract of May 1st, 1888.

XI.

Prior to July 1st, 1889, the date limited in said contract of October 26th, 1888, the complainant, Patrick P. Ford, completed his work

of grading for said ditches and reservoirs, with the acceptance and approval of the defendant's engineer, E. H. Kellogg.

XII.

On the 13th day of June, 1889, the defendant's engineer gave to the complainant a written acceptance of said work, stating that the same had been completed and had been accepted by said engineer, and that the complainant was entitled to compensation in final settlement thereof for 441,396 cubic yards of excavation and embankment, at 11 cents per cubic yard, amounting to $48,543.56; and that the balance due upon said final estimate after deducting all former estimates, paid and unpaid, was $12,625.53.

XIII.

On or about the first day of May, 1889, the defendant's engineer, E. H. Kellogg, gave to the complainant a partial estimate, being estimate No. 6, showing amount due on account of said estimate, after reserving 10 per cent., to be $5,010.92, which amount has never been paid.

XIV.

In rendering the estimate for January 1st, 1889, the engi-
70 neer included $45.85 for extra work at a head-gate, being work not covered by the contract of October 26th, 1888; but in rendering the February estimate this amount was apparently by inadvertence deducted; and this item for extra work has never been paid.

XV.

Additional extra work was performed by Patrick P. Ford to the amount of $401, less $14, being $387, and a bill therefor was authorized and approved by the defendant's engineer, E. H. Kellogg; and the amount of this bill has never been paid.

XVI.

There is due to the contractor, Patrick P. Ford, from the defendant, The Springer Land Association, pursuant to the terms of the contract, as per estimates of the defendant's engineer, E. H. Kellogg, the sixth estimate, due May 10th, 1889, to wit: $5,010.92; the final estimate, due June 13th, 1889, $12,625.53; and for extra work, due June 13th, 1889, the sum of the items of extra work above mentioned, to wit: $432.75.

XVII.

On July 3rd, 1889, the complainant, Patrick P. Ford, caused to be filed in the recorder's office of Colfax county, a notice of mechanics' lien, sworn to on the 2nd day of July, 1889, which had attached thereto a copy of the contract of October 26th, 1888, with the specifications thereto attached. Said notice named the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W.

Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter and Frank Springer, trustees of the Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company, as owners or reputed owners; and stated the sum of $17,634.27 as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners or reputed owners, after deducting all just credits and offsets for excavating and embankments," performed under said contract; and also stated that there was due the "further sum of $390, for extra excavating and hauling ordered by *by* the engineer in charge of said ditch."

XVIII.

Said notice of mechanics' lien, in addition to the description of the ditch and reservoirs referred to in said contract of October 26th, 1888, described the following lands as lands to be irrigated thereby, to wit: Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3,
71 10, 2, 1, 12 and 5, in township 26 north, of range 21 east; and also sections 30, 31, 29, 32, 33, 34 and 35 in township 26 north of range 22 east; and also sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5 and 15, in township 26 north of range 22 east; and also sections 20, 21, 22, 23, 26, 25, 36, 35 and 27, in township 25 north of range 22 east, in Colfax county, New Mexico.

And said notice of mechanics' lien stated as follows: "The names of the reputed owners of the lands hereinabove mentioned are the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter and Frank Springer, trustees of said company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company."

XIX.

The lands described in said notice of lien are included in the description of lands mentioned in the contract of May 1st, 1888, as lands to be irrigated by said system of canals therein provided to be constructed, and the proceeds of the sale whereof should be subject to the terms in said contract set forth.

XX.

It is admitted in the answer of the Springer Land Association, Christopher C. Strawn, C. M. Barnes, M. W. Mills, W. J. Tewksbury, F. J. Eames, W. A. Comstock, and the Springer Land Association, a corporation of the Territory of New Mexico, to the bill of complaint, that the lands described in the complaint are covered by the ditches above mentioned, and are appurtenant thereto.

XXI.

It is alleged in the bill of complaint and admitted in the answer of the defendants, that the defendant, The Springer Land Association, through its agents and officers, claimed to be the owners of said ditch, lands, reservoirs and other property in the bill of complaint described.

XXII.

It is averred in the complaint and admitted in the answer, that, prior to the making of the contract of October 26th, 1888, the Maxwell Land Grant Company owned the land described in the bill of complaint, and still claim to have some right, title or interest in said land; and that the said The Maxwell Land Grant Company had entered into a contract (being the contract of May 1st, 1888,) by which the Springer Land Association was to have the right to construct said ditch and its reservoirs and accessories, on the land of the said The Maxwell Land Grant Company.

XXIII.

The complainant, Patrick P. Ford, sublet a part of the work under his contract of October 26th, 1888, his subcontracts being in writing, and made with the approval of the defendant's en-
72 gineer, E. H. Kellogg; and said contract of October 26th, 1888, contained this clause in the specifications made part thereof, to wit:

"Subcontracts must be submitted to the engineer and receive his approval before work is begun under them. No second subcontracts will be allowed, and subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer."

XXIV.

Each of the subcontracts made by the complainant, Patrick P. Ford, with the subcontractors contained a clause reading as follows:

"An estimate for the work of each calendar month will be paid by the company (meaning the Springer Land Association) on or before the 10th of the month following that in which the work is done. As soon as such estimate is paid, the said party of the second part (Patrick P. Ford), will pay to the subcontractor the amount of his subestimates, less ten per centum retained, as detailed in the specifications.

It is mutually agreed that the amount of these subestimates will in no case be demanded or paid in advance of the payment of the regular estimate."

XXV.

The complainant, Patrick P. Ford, paid to his several subcontractors, in accordance with the terms of his subcontracts, all amounts due under the first five monthly estimates made by the defendant's engineer, but at the time of the commencement of this

suit had not paid all that was due under the sixth (May, 1889) estimate, or under the final estimate of June 13th, 1889, the same being the estimates heretofore found not to have been paid to the said Patrick P. Ford by the defendant, The Springer Land Association.

XXVI.

Subsequent to the making of the final estimate of June 13th, 1889, liens against said property were filed in the following order: Patrick P. Ford first filed a lien on the 3rd day of July, 1889, as heretofore found; Subcontractor McGarvey filed a notice of lien on the 25th day of July; Subcontractor Dargel filed a notice of lien on the 1st day of August, 1889; Subcontractor McGarvey made a second filing of notice of lien on the 5th day of August, 1889. The amount claimed in the lien of the complainant, Patrick P. Ford, included all sums that would be due to his subcontractors, as shown by their liens subsequently filed.

XXVII.

The evidence does not sustain the allegation of the cross-bill, that the complainant, Patrick P. Ford, entered into some
73 fraudulent arrangement or copartnership with Edwin H. Kellogg, the engineer in charge of said work; or was in collusion with the said Edwin H. Kellogg as to the amount of work actually performed by said Patrick P. Ford under said contract, or as to the completion of said work by him under said contract; or that by means thereof he procured the said Edwin H. Kellogg to make overestimates as to the work done, from time to time; or a false or fraudulent final estimate on account of said work; or that the said Kellogg, at the time he made such final estimate, had entered into a conspiracy with the said Ford to defraud and cheat the said defendant.

XXVIII.

The evidence does not sustain the allegation of the cross-bill, that the said Patrick P. Ford combined or confederated with the said Edwin H. Kellogg and procured him to make a final estimate of the said work and to deliver the same to the said Patrick P. Ford.

XXIX.

The evidence does not sustain the allegation of the cross-bill, that at other and different times and by like fraudulent means or by other fraudulent means, the said Patrick P. Ford procured other and earlier estimates made by the said engineer, in excess of the amount due at the time of making the same.

XXX.

The evidence does not sustain the allegation of the cross-bill, that at the time of the said final estimate the said The Springer Land Association had greatly or at all overpaid the said Ford for work done under said contract for said ditch system and reservoirs.

XXXI.

The evidence does not sustain the allegation of the cross-bill, that the said Patrick P. Ford failed to do and perform the work which he did not do on said contract in a good and workmanlike manner and cause the same to be done as provided in said written contract.

XXXII.

The evidence fails to sustain the allegation of the cross-bill, that the complainant, Patrick P. Ford, failed to dig the ditches to the depth, width and length in said contract called for; or that he failed to make the various embankments of the height, depth, width or strength called for in said contract, or that he never finished or completed the same.

XXXIII.

74 The evidence does not sustain the charge that complainant, Patrick P. Ford, had anything to do with the selection of Edwin H. Kellogg as engineer for the Springer Land Association.

XXXIV.

The complainant, Patrick P. Ford, in the performance of his work under said contract of October 26th, 1888, personally constructed that part of the embankment of reservoir No. 7, extending from the south end thereof to station 26, being 2,600 feet; and residue of said embankment, from station 26 to the north end thereof, was constructed by a subcontractor, Henry Dargel.

XXXV.

The complainant, Patrick P. Ford, constructed originally his part of said embankment of reservoir No. 7, to the maximum height of 26 feet, as required by his contract, and with the slopes and in the manner by said contract required; leaving a berme at the inner toe thereof of 25 feet in width.

XXXVI.

By mistake of the defendant's engineer, E. H. Kellogg, that portion of the said embankment of reservoir No. 7, constructed by the subcontractor, Henry Dargel, was built to a maximum height of more than 27 feet, being 1 foot higher than the original contract requirements and 1 foot higher than the portion originally constructed by said complainant, Patrick P. Ford.

XXXVII.

The defendant's engineer, E. H. Kellogg, subsequently required the complainant, Patrick P. Ford, to put on additional material upon his portion of said embankment, so as to make the height thereof correspond with the height of the work performed by said Henry Dargel; and for the purpose of obtaining the material therefor, instructed him to take earth from the 25-foot berme, which he had left at the inner toe of the embankment.

XXXVIII.

The original construction by the complainant, Patrick P. For of his part of said embankment, was in accordance with the spec fications of his contract, and in accordance with stakes set for sai work by the defendants' engineer, E. H. Kellogg.

XXXIX.

The complainant, Patrick P. Ford, was in no respect responsibl for the mistake of the defendant's engineer, E. H. Kellogg, abov mentioned or for any consequences resulting therefrom.

XL.

No damage resulted to the defendant or to the embankment said reservoir No. 7, by reason of the reduction in the heigh
75 of the berme originally left at the inner toe of said em-men

XLI.

The defendant, The Springer Land Association, did not cause wave-break to be constructed for the protection of the embankmen of reservoir No. 7, until after water had been turned against th same and after damage had accrued thereby.

XLII.

The main portion of any damage resulting from the action water on said embankment was at and in the vicinity of the outl pipe, which was located at station 30, being about 400 feet north the north end of that portion of the embankment built by the com plainant, Patrick P. Ford, personally.

XLIII.

The complainant, Patrick P. Ford, completed his work under th contract of October 26th, 1888, in accordance with the terms of hi contract and specifications thereto attached.

Conclusions of Law.

I.

The defendant, The Springer Land Association, is bound by th acceptance and approval of complainant's work by its enginee Edwin H. Kellogg, and by the estimates made by such engineer.

II.

The defendant, The Springer Land Association, having failed t pay the sixth estimate, as well as the seventh or final estimate, th filing of liens by subcontractors, subsequent to the filing of th complainant's lien, did not result through any failure on the par of the complainant to liquidate his just indebtedness as connecte with the work.

III.

The complainant, Patrick P. Ford, is entitled to judgment against the defendant, The Springer Land Association, in the principal sum of $18,069.20, with interest at the rate of six per cent. per annum on $6,010.82 thereof, from May 10th, 1889, and upon residue of said sum from June 13th, 1889.

IV.

The complainant, Patrick P. Ford, is entitled to a decree of foreclosure of his mechanics' lien as against all of the defendants; such decree to provide that the complainant's lien is for the amount
76 mentioned therein, with interest, and attaches to all the ditches and lands in said lien and in the bill of complaint described; and that the said premises may be sold in accordance with the terms of the statute, for the satisfaction of said lien.

And decree may be prepared accordingly.

JAMES O'BRIEN,
Chief Justice, etc.

Dated March 28th, 1893.

TERRITORY OF NEW MEXICO, }
County of Colfax, } ss:

In the District Court for the Fourth Judicial District of the Territory of New Mexico in and for said County.

PATRICK P. FORD, Plaintiff,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Defendants. } Decree.

This cause now coming on for decree in accordance with the findings of fact and conclusions of law heretofore by the court made and entered in this cause, it is now

By the court ordered, adjudged and decreed: that the plaintiff, Patrick P. Ford, have a lien for the sum of twenty-two thousand and ninety-seven dollars and seventy-five cents ($22,097.75), being for the amount mentioned in his notice of lien, with interest at six (6) per cent. to the date of this decree, upon the following-described real estate, property and premises, situated in the county of Colfax and Territory of New Mexico, to wit: The certain ditch, canal and reservoirs commonly known as the Cimarron ditch and its accessories, the said ditch beginning at a point where the Ponil and

Cimarron rivers meet to form the Cimarron, thence continuing in a devious course easterly, to a point on the Atchison, Topeka and Santa Fe railway, about five (5) miles northeast of the town of Springer, in the county of Colfax, Territory aforesaid, being in length about twenty-six (26) miles; and the said ditch and land appurtenant thereto for right of way, being of about the uniform width of sixty (60) feet, together with all lateral ditches and reservoirs, and the land covered by and appurtenant to the same, as aforesaid; also twenty-two thousand (22,000) acres of land appurtenant to said ditch, the said land being also situated in the said county of Colfax, Territory of New Mexico, and under the said ditch, and to be irrigated thereby, and described
77 according to townships and sections as follows, to wit: Sections thirty (30), thirty-two (32), thirty-three (33), twenty-eight (28), twenty-two (22), twenty-three (23), twenty-six (26), twenty-four (24), twenty-five (25), thirty-six (36), twenty-seven (27), thirty-one (31), four (4), three (3), ten (10), two (2), one (1), twelve (12) and five (5), in township twenty-six (26) north, of range twenty-one (21) east; also sections thirty (30), thirty-one (31), twenty-nine (29), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35), in township twenty-six (26) north, of range twenty-two (22) east; also sections two (2), three (3), ten (10), eleven (11), fourteen (14), seventeen (17), eighteen (18), seven (7), six (6), five (5) and fifteen (15), in township twenty-six (26) north, of range twenty-two (22) east; also sections twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), twenty-six (26), twenty-five (25), thirty-six (36), thirty-five (35), and twenty-seven (27), in township twenty-five (25) north, of range twenty-two (22) east.

It is further ordered, adjudged and decreed, that the defendants, The Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, and The Springer Land Association, a corporation, pay, or cause to be paid, within ninety (90) days from the date of this decree, the said sum of twenty-two thousand and ninety-seven dollars and seventy-five cents ($22,097.75), with interest from this date at six (6) per cent. per annum; that three thousand dollars ($3,000) of said sum of $22,097.75 shall, by the said defendants, be paid to the clerk of this court, subject to the further order of the court, as hereinafter provided, and the residue of said sum of $22,097.75, with interest upon said total sum from the date of this decree to the time of payment, shall, by the said defendants, be paid to the plaintiff herein, Patrick P. Ford, or his solicitor, and said defendants shall take receipt therefor, which receipt shall by the said defendants be filed with the clerk of this court, within the period hereinabove limited; and the said defendants shall, within said period of ninety (90) days from this date, also pay to the clerk of this court, all costs accrued in this cause.

It is further ordered, adjudged and decreed, that, in case the said defendants shall make default in the payment of said sums, or any of them, within the time herein limited, then Jeremiah Leahy, who is hereby appointed special master for that purpose shall proceed

forthwith to sell the said ditches, canals, reservoirs, laterals, rights of way and accessories, as an entirety together with so much of the lands hereinabove described as may be necessary to pay the principal, interest and costs, hereinabove mentioned, including the master's fees and costs of sale, provided, however, that the master shall not sell any of said lands separately, unless in his opinion such separate sale can be made without material injury to the parties interested. Such master shall sell said property and premises,
78 at public vendue to the highest and best bidder for cash, after first giving public notice thereof by publication in some daily or weekly paper published in said county of Colfax, once a week for four successive weeks, stating the time and place of such sale, and the terms thereof. The complainant, Patrick P. Ford, may become a purchaser at said sale, and in that event, and in the event that he has not then assigned or otherwise parted with his interest in this decree, his receipt shall be accepted by the said master in lieu of cash, for such amount as would be payable to him by the master, under the terms thereof. Upon making such sale the said master shall execute a deed to the purchaser for the property and premises so sold, and the purchaser at said sale shall be promptly let into possession of the property and premises by him so purchased, upon production of the master's deed therefor.

It is further ordered, adjudged and decreed, that, out of the proceeds of such sale, the said master shall pay:

First. The costs of sale, including a reasonable fee to said master.

Second. All costs accrued in this cause shall be paid to the clerk of the court, including the sum of one thousand dollars ($1,000.00), allowed as plaintiff's attorney fee and to be taxed as part of the costs of this case.

Third. To the clerk of this court, subject to the further order of the court, the sum of three thousand dollars, (3,000.00).

Fourth. To the plaintiff, Patrick P. Ford, or his solicitor, the residue of the proceeds of such sale, not exceeding the sum of nineteen thousand and ninety-seven dollars and seventy-five cents, ($19,097.95); together with interest on the principal sum of $22,097.65, from the date of this decree to the date of sale.

Fifth. The surplus, if any, resulting from such sale, after the payment of the several items hereinabove mentioned, shall, without delay, be paid to the clerk of this court, subject to the further order of the court.

And the said master shall report his doings in the premises to the court, and in the event of a deficiency in the proceeds of such sale, said master shall report to the court the amount of such deficiency.

A copy of this decree, duly certified by the clerk of this court, under the seal of this court, shall be sufficient authority to the master herein designated, to proceed to sell the property, lands and premises herein described, in accordance with the terms hereof.

It is further hereby ordered, adjudged and decreed, that the lien of the plaintiff upon the property, lands and premises herein described, dates from and relates to the date of the commencement of the work described in the bill of complaint, to wit: November 1,

1888, and that, in default of payment by the defendants here-
79 inabove named as in this decree required, the Springer Land Association, Christopher C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock, the Springer Land Association, a corporation of the Territory of New Mexico, the Maxwell Land Grant Company, a corporation, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter and Frank Springer, trustees of the said Maxwell Land Grant Company, acting under the name, style and title of the board of trustees of the Maxwell Land Grant Company, and each of them, and all persons claiming by, through or under them, by virtue of the rights acquired subsequent to November 1, 1888, stand absolutely debarred and foreclosed, of and from all equity of redemption, of, in and to so much of the property, lands and premises, hereinabove described as shall be sold as aforesaid by virtue of this decree.

And whereas, one Henry Dargel has instituted suit in this court against the Springer Land Association and others, the same being cause No. 1271 on the docket of this court, wherein said Henry Dargel claims, that, as a subcontractor under the plaintiff herein, he is entitled to a lien upon the premises in this decree described, to the sum of twenty-two hundred and seventy-nine dollars and thirty cents ($2,279.30), with interests and costs.

Now, it is hereby ordered, that the fund of three thousand dollars ($3,000.00), to be paid to the clerk of this court, as herein provided, shall by said clerk be held until the determination of said suit, at which time either party hereto may apply to this court for further orders in relation thereto. Provided, however, that if, at any time, the plaintiff herein, Patrick P. Ford, shall file with the clerk of this court the receipt of said Henry Dargel, or of his solicitor of record, showing the payment and discharge by the said Patrick P. Ford, of the said claim of the said Henry Dargel, with evidence that said lien claimed by said Henry Dargel has been cancelled or released of record, then the clerk of this court shall pay over to the said Patrick P. Ford, or his solicitor, the entire amount of said fund of three thousand dollars.

It is also hereby ordered, that all further orders and decrees in the premises be reserved until the further order of this court.

JAMES O'BRIEN,
Chief Justice, etc.

Dated, March 28, 1893.

District Court, Fourth Judicial District, Territory of New Mexico, County of Colfax.

PATRICK P. FORD
vs.
THE SPRINGER LAND ASSOCIATION *et al.* } Chancery. No. 1301.

80 Now come the defendants in said cause, before the enrollment of the final decree herein, and each for himself objects and excepts as follows:

First. To the action of the court in failing to strike out and suppress upon motion made for that purpose before the final argument of said cause, those certain portions of testimony in said cause to wit:

In the testimony of Edward H. Kellogg the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Henry Wood, the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of William E. Cole the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of William J. Tewkesbury the questions and answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

In the testimony of Peter J. Murphy the questions and answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

In the testimony of Patrick P. Ford the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Frank W. Wood the questions and answers to the questions which were objected to by defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Charles N. Barnes the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Roy Tewkesbury the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of A. C. Barnes the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of William L. Johnson, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of C. C. Strawn, the questions and answers which were objected to by the defendants on the taking of the cross and recross testimony of the witness.

In the testimony of K. E. Booth, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

81 In the testimony of William J. Tewkesbury, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of Henry Sturges, the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Levi S. Preston, the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Michael Keenan, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of Robert H. Cowan, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of Charles Springer, the questions and answers to the questions which were objected to by the defendants on the taking of the cross and recross testimony of said witness.

In the testimony of Jerry Leahy, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of M. W. Mills, the questions and answers to the questions which were objected to by the defendants on the taking of the cross-testimony of said witness.

In the testimony of John R. Griffin, the questions and answers to the questions which were objected to by the defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of James B. Griffis, the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of John Keily, the questions and answers to the questions which were objected to by the defendants on the taking of the direct testimony of said witness.

In the testimony of Edward Sullivan, the questions and answers to the questions which were objected to by the defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Robert A. McConnell the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of Alonzo M. Wells, the questions and
82 answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

In the testimony of Patrick P. Ford, the questions and answers to the questions which were objected to by defendants on the taking of the direct and redirect testimony of said witness.

In the testimony of M. P. Pels, the questions and answers to the questions which were objected to by defendants on the taking of the direct testimony of said witness.

Second. To the finding of facts made by the court and to each finding separately, for the reason that the same is not supported by the evidence, and much objection and exception is made to the findings numbered I, also findings II, III, etc., to XLIII.

Third. To the conclusions of law found by the court and to each conclusion separately for the reason that the same is not supported by any legal, competent or material testimony and is not the law of the case, and such objection and exception is made to the conclusion of law numbered II, etc., to IV.

Fourth. Said defendants and each of them also separately object and except to the conclusion of the court as to the facts established by the evidence and to the conclusions of law reached by the court

Fifth. To all the findings of facts and conclusions of law filed in said cause on the following grounds. (*a*) Because the same were filed on the day of filing the final decree in said cause and no copy of the same was served on defendants' solicitors. (*b*) Because no time or opportunity was given to defendants' solicitors to be heard on objections to such findings, until after enrollment of the decree in said cause.

Said defendants and each of them separately object and except to the decree filed and enrolled in said cause both as to substance and form, as follows:

First. Because there was no opportunity for said defendants to be heard on the draft of said decree, before enrollment of the same, or to move for a rehearing or modification.

Second. Because said decree operates as a personal judgment against each of said defendants.

Third. Because said decree is not supported by sufficient evidence and is not warranted by the evidence in the case.

Fourth. Because said decree is excessive in amount.

Fifth. Because said decree is erroneous in affixing a lien upon the 22,000 acres of land described in the decree as being appurtenant to the ditches and reservoirs described in the bill of complaint.

83 Sixth. Because said decree is erroneous in establishing any lien whatever on the real estate and ditch and reservoir system described therein.

Seventh. Because said decree is erroneous in providing that the master shall not sell any of said lands separately, unless in his opinion such separate sale can be made without material injury to the parties interested.

Eighth. Because said decree is erroneous in failing to require the master to sell the said lands in separate parcels, so far as the same could be done without injury to the parties interested.

Ninth. Because said decree is erroneous in this, it recognizes the duty of the complainant under his contract to remove all liens on the property in question, and yet gives him foreclosure of his lien before such other liens were removed.

Tenth. Because the decree is erroneous in requiring execution to issue as in the decree provided.

Eleventh. Because said complainant is not legally or equitably entitled under the laws and the evidence of this case to the relief granted him in said decree.

Twelfth. Because the decree is erroneous in not limiting the lien established by the court to the improvement, ditches, dams and reservoirs constructed together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof.

The foregoing objections and exceptions to said findings of facts and conlusions of law and decree were taken orally in open court at the time the court announced and signed said findings and decree in this cause, and leave was then and there given to defendants' solicitors to make and file such objections and exceptions specifically in writing with the same force and effect as if made in writing, and

filed at the moment of announcing such findings and decree and before the enrollment of said decree and the same are now made of record as of said time and as of date March 28th, 1893.

JAMES O'BRIEN,
Chief Justice, etc.

84 TERRITORY OF NEW MEXICO, }
County of Colfax. }

In the District Court for the Fourth Judicial District, Sitting within and for the County of Colfax, Territory of New Mexico.

PATRICK P. FORD, Plaintiff,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. Strawn, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Defendants. } Chanc'y. No. 1301.

Now comes the said several defendants in the above-entitled cause by their solicitors, and apply to this honorable court to allow them an appeal to the supreme court of the Territory of New Mexico from the decree made and entered in said cause, and dated March 28th, 1893, and to fix the amount of bond to be given by or for said appellants to stay the execution of said decree pending such appeal.

LONG & FORT,
A. A. JONES,
FRANK SPRINGER,
Solicitors for Defendants and Appellants.

On reading and filing the foregoing application it is ordered, that an appeal in said cause to the supreme court of the Territory of New Mexico be allowed as prayed for, and that execution of the said decree be stayed pending said appeal upon the appellants or some person or persons for them giving a bond on or before the 26th day of June, 1893, in the sum of thirty thousand dollars with sufficient sureties to be approved by this court or the judge thereof, conditioned as provided by the statute in such cases.

JAMES O'BRIEN,
Chief Justice, etc.

Las Vegas, N. M., March 28th, 1893.

And afterwards, to wit, on the 26th day of June, 1893, there was filed in said clerk's office a bond in the sum of thirty thousand dollars, which said bond was duly approved by the judge of said court.

85 And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at the city of Santa Fé, the seat of government of said Territory, on the last Monday in July, 1894, on the sixteenth day of said term, the same being Friday, August 17, 1894, the following, among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee, *vs.* SPRINGER LAND ASSOCIATION *et al.*, Appellants.	554.	Appeal from District Court of Colfax County.

This cause, coming on for hearing upon the transcript of record, assignments of error, and briefs of counsel on file, is argued by E. V. Long, Frank Springer, and A. A. Jones, Esquires, for appellants, and J. F. Vaile, Esquire, for appellee, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at the city of Santa Fé, the seat of government of said Territory, on the last Monday in July, 1895, on the twenty-seventh day of said term, the same being Wednesday, August 28, 1895, the following, among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee, *vs.* SPRINGER LAND ASSOCIATION *et al.*, Appellants.	554.	Appeal from Colfax County.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a former term, the court, being now sufficiently advised in the premises, announces its decision by Associate Justice Laughlin, Chief Justice Smith and Associate Justice Collier concurring, affirming the decree of the court below and remanding this cause to the court below with directions to make such order as will carry the same into effect. It is therefore ordered, adjudged, and decreed by the court that the decree herein of the district court in and for the county of Colfax be, and the same hereby is, affirmed, and that this cause be, and the same hereby is, remanded to said district court with directions to make such order as will carry the same into effect; and it is further considered and adjudged by the court that the said appellee do have and recover of the said appellants his costs in this be-
86 half expended, as well in the court below as in this court, to be taxed, and that he have execution therefor.

And afterwards, to wit, on the 23rd day of October, 1895, there was filed in the office of the clerk of said supreme court a motion for an appeal in the said cause; which said motion is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, at the July Term, A. D. 1895.

PATRICK P. FORD, Complainant and Appellee,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewkesbury, Frederick J. Eames, William A. Comstock; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martines P. Pells, Henry M. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Defendants and Appellants.

The above-named defendants and each and all of them, conceiving themselves aggrieved by the decision and judgment of the said supreme court made and entered in the above-entitled cause on the 19th day of August, 1895, affirming the judgment of the district court herein, do hereby at the same term of said court appeal from said judgment to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was entered or so much thereof as may be necessary to a review of said judgment may be sent to the Supreme Court of the United States; also that this court will fix the amount of the supersedeas bond to be given by said appellants, in order that execution of said judgment may be suspended until the decision of said Supreme Court of the United States upon said appeal may be had.

LONG & FORT,
FRANK SPRINGER,
Solicitors for Appellants.

And afterwards, at the regular term of said supreme court of the Territory of New Mexico last aforesaid, on the forty-second day thereof, the same being Wednesday, October 23, 1895, the fol-
87 lowing, among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } 554. Appeal from Colfax County.

And now, to wit, on October 23rd, 1895, it is ordered that the appeal in the above-entitled cause be, and the same hereby is, allowed,

as prayed for, in open court, and it is further ordered that the sum of the supersedeas and appeal bond to be given by said appellants is fixed at five hundred dollars, and that upon the filing of bond in said sum, with sureties, to be approved by the chief justice of this court, in the usual form execution of the judgment appealed from and further proceedings thereunder be suspended till the decision thereon by the Supreme Court of the United States.

THOMAS SMITH.
Chief Justice.

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } 554. Appeal from Colfax County.

The defendants in the above-entitled cause on this day come and pray the court to make and certify a statement and findings of the facts established by the evidence in said cause, which is accordingly done.

THOMAS SMITH,
Chief Justice.

And afterwards, to wit, on the 23rd day of October, 1895, there was filed in the office of the clerk of said supreme court of New Mexico an appeal bond in said cause; which said bond was and is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, 1895.

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } No. 554.

(Appeal from Colfax county.)

Know all men by these presents that we, William J. Tewkesberry, of the county of Cook and State of Illinois, and Frank Springer, of the county of San Miguel and Terrritory of New Mexico, are held and firmly bound unto the above-named Patrick P. Ford in the sum of five hundred dollars, to be paid to the said Patrick P.
88 Ford; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 19th day of October, A. D. 1895.

Whereas the above-named defendants and appellants, The Springer Land Association and The Maxwell Land Grant Company, are about to prosecute an appeal to the Supreme Court of the United States to reverse the decision and decree rendered in the above-entitled cause by the above-named court at the present term thereof, on, to wit, the 28th day of August, 1895:

Now, therefore, the condition of this obligation is such that if the above-named The Springer Land Association and The Maxwell Land Grant Company shall prosecute the said appeal without delay and to effect and answer all damages and costs if they fail to make said appeal good and shall pay and discharge or cause the same to be done, whatever judgment may be rendered in the said Supreme Court of the United States, together with all costs, and abide the judgment of the said court, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

WM. J. TEWKESBERRY. [SEAL.]
FRANK SPRINGER. [SEAL.]

TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Personally appeared before me, the undersigned, a notary public in and for the said county of Santa Fé, the above-named W. J. Tewkesberry and Frabk Springer, obligors on the foregoing bond, and each for himself acknowledged the execution of the same for the uses and purposes in said obligation mentioned.

In witness whereof I have hereunto set my hand and official seal the day and year last above named.

R. C. GORTNER,
[SEAL.] *Notary Public.*

The above and foregoing bond approved this 19 day of October, A. D. 1895.

THOMAS SMITH,
Chief Justice, &c.

And afterwards, at the term of said supreme court of the Territory of New Mexico last aforesaid, on the forty-third day thereof, the same being Thursday, October 24, 1895, the following,
89 among other, proceedings were had, to wit:

PATRICK P. FORD, Appellee,
vs.
THE SPRINGER LAND ASSOCIATION *et al.*, Appellants. } 554. Appeal from Colfax County.

It is ordered by the court that the supersedeas bond executed by said appellants on appeal from said district court to this court shall be, and the same hereby is, declared to be the supersedeas bond in this cause on appeal from this court to the supreme court of the United States.

And afterwards, to wit, on the 29th day of October, 1895, there *was* filed in the office of the clerk of said supreme court of New Mexico the findings of fact in said cause; which said findings of fact were and are in the words and figures following, to wit:

90 In the Supreme Court of the Territory of New Mexico.

PATRICK P. FORD, Appellee, *vs.* THE SPRINGER LAND ASSOCIATION *et al.*, Appellants.	No. 554. Appeal from Colfax County, District Court.

The court makes the following statement and findings of the facts established by the evidence in the above-entitled cause, to wit:

On the 26th day of October, 1888, the defendant The Springer Land Association entered into a contract with the complainant, Patrick P. Ford, for the grading work in the construction of a certain ditch line and reservoir system for irrigation in Colfax county, New Mexico. Said contract and the specifications made a part of it were in the following terms:

Contract and Specifications for the Cimarron Ditch.

Contract.

This agreement made and entered into this 20th day of October, 1888, by and between P. P. Ford, party of the first part, and the Springer Land Association (by C. N. Barnes, general manager, approved by C. C. Strawn, president) a duly organized association, party of the second part, witnesseth: That for and in consideration of the covenants and agreements hereinafter set forth, the parties hereto mutually agree and bind themselves as follows: The party of the first part agrees to furnish all necessary tools and labor, and perform all the work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made a part of this contract. Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1st, 1889. The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached. It is hereby mutually agreed that as the substance of clause "X" of the specifications, concerning the time in which said work is to be completed, is of vital importance to the company, no extension of time beyond the date fixed shall be asked or granted, except for causes mentioned, and that the failure of the con-
91 tractor to fulfill the obligations herein assumed will work a forfeiture to the company of all the retained percentage accumulated to that date, and shall be considered by both parties in the light of liquidated damages retained by the company through

such failures. In witness whereof, we have hereunto set our hands and seals this 26th day of October, A. D. 1888.

P. P. FORD, [SEAL.]
C. N. BARNES, [SEAL.]
General Managers Springer Land Association.

Approved by—
C. C. STRAWN,
President Springer Land Association.

Specifications.

For the grading of the Cimarron ditch:

1. Gradations.—Under this general head will be included all excavations and embankments required for ditch and reservoirs; all excavations required for foundations of flumes and gates and other structures, and the grading approaches to bridges, as well as any and all kind of grading work incident to the completion of the work herein contemplated.

2. Excavations.—All excavations for ditches will be made to the full width and depth, and for such slopes as shall be indicated by the engineer. Bottom of ditches shall be smoothly dressed to grade, level across, and cleared of all loose stones and other matter, which might make a rough or uneven surface. Slopes will be smoothly dressed to conform to the straight or curved line indicated by the stakes. All excavated material will be classified as earth.

3. Embankments.—Materials taken from excavations will be placed in adjoining embankments as follows: First. The bank on the lower side of the ditch will be built to the full height and width, indicated by the engineer, a beam of four feet width being left between inner top of bank and edge of excavation. Second. The remaining material will be used on level ground to build the bank on upper side. Third. Any excess of material will then be wasted on the outside of lower bank, but never piled in hills on top of bank. The price for excavation includes a free haul of one hundred feet. Material for greater distance will be paid for at the rate of two cents per one hundred feet or fraction thereof in excess of the haul distance.

4. Special embankment.—There will be built across several depressions, to serve as settling basins, and to increase capacity of small reservoirs. They will be built in every case by borrowing material from the inner or water side of the embankment. No borrow pit will be allowed nearer than fifteen feet from the toe of the bank. Material used will be placed in layers not more than ten inches in thickness, driving lengthwise the bank in every case. All banks
92 shall be built to such additional height*h* to compensate for shrinking or settling, as the engineer may direct, with extra charge. The side of these banks will be deeply plowed with parallel furrow, four feet apart, lengthwise of the bank, before filling is begun.

Reservoir No. 7.—The embankment for this reservoir will be as

follows: First. The site will be deeply plowed lengthwise, under strips of four furrows inside each, with spaces of six feet between the strips. Second. On the line marked for the top of the embankment, a trench eight feet wide, and one to four feet deep, will be excavated, the material being placed in the outer side of the embankment. The trench will then be filled with borrowed material, wheel scrapers being used and driven lengthwise. The cost of this preparatory work aside from the yardage of the trench, will be included in the price named for the embankment. All material used in this embankment will be borrowed from the inner or water side, leaving a *beam* of twenty-five feet from the toe. The price named for embankment will include the total haul, as no overhaul estimate will be made. The dimensions of this bank will be as follows: Width on top, twelve (12) feet; inner slope, three (3) feet horizontal to one (1) foot vertical; the outer slope will be one and one-half (1½) to one (1). The greatest height on center line will be twenty-six (26) feet.

5. Borrow.—In case the excavation should fail to furnish sufficient material for adjacent embankment, these will be completed from borrowed pits; no such pits being allowed nearer than fifteen (15) feet from the toe of the embankment. Borrowed material will be measured in embankment, and payed for the same at same rate as other work.

6. All risk of damage or loss to the work from floods or other casualities, will be assumed by the contractor, until his work has been accepted, and no charge for loss or deterioration on this account will be allowed, but a reasonable extension of time may be granted by the engineer.

7. Contractors must carefully perserve all stakes and bench-marks, and persistent destruction of these will involve a charge for resetting.

8. Contractors will not sell, or allow to be sold, any intoxicating liquors on or near the work. Disorderly or quarrelsome persons will be discharged at the request of the engineer. It is specially stipulated that should the contractor or any other person, directly or indirectly connected with the work, establish a store, or commissary so called, for the sale of supplies or other goods to employees, such store or commissary shall be conducted honestly and fairly, and on a plan of strict justice. The company is determined
93 that the practice of defrauding employees through the medium of false or extortionate charges shall not prevail on this work. The right is therefore reserved by the company to absolutely annul this contract as to any uncompleted work at any time on satisfactory and unrefuted proof being rendered. The violation of this rule will be considered a breach of contract, and will work a forfeiture of all retained percentages to that date.

9. Contractors must inform themselves by personal examination as to the nature of the soil, the general features of surface, accessibility and all other matters affecting the contract. The quantities given by the engineer are approximate only, nor will any information furnished by the engineer or his assistants on any of the

above points, relieve the contractor of any part of his obligation to fully complete his work. The contractor will give personal attention to the work.

10. Time.—As the time specified for the final completion of the work herein contemplated is an essential feature of the contract, no extension of time will be granted, provided, however, that should the work be seriously delayed by continuously inclement or hard freezing weather, or the like unavoidable cause, the engineer may, at his discretion, grant an extension of time equal to that so lost. If at any time during the progress of the work the engineer shall judge that the force employed is insufficient to insure its completion within the limit of time stipulated in the contract, he may order an increase of force as will, in his judgment, accomplish the desired purpose, and the contractor, on receiving written notice to that effect, will immediately take the necessary steps to comply therewith.

11. Extra work.—No extra work will be allowed or paid for unless done under written order from the engineer, which order shall bear as an indorsement the agreed price for the same. In case of disagreement between the parties to the contract, as to the intent and meaning of any part of these specifications, such matter shall be referred to the engineer, and his decision shall be final and binding on both parties.

12. Damages.—The contractor will be held strictly responsible for all damages to the property or crops of persons along the line of work.

13. Subcontracts.—Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer.

14. All orders of the engineer concerning any part of the work must be promptly obeyed.

94 15. Estimates.—On or about the first day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate, will only be paid upon satisfactory showing that the work is free from all danger, from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work.

Previous to the making of the last-mentioned contract and on May 1, 1888, the Maxwell Land Grant Company made a contract with C. C. Strawn and associates, who afterwards organized the Springer Land Association, which succeeded to their rights and obligations, by which the Maxwell Company gave to them a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was, among other things, provided that with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises, to be granted to it by the other party, it agreed to set apart and reserve from sale 22,000 acres of its lands, to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement Strawn and his
95 associates were to expend about sixty thousand dollars, or a sufficient sum, to complete the enterprise on the proposed plan. This contract is found in the record as Exhibit "A" to defendants' answer.

And afterwards, to wit, on January 3rd, 1891, there was filed in said clerk's office, Exhibit "A," to the answer of the defendants, which said Exhibit "A" is in words and figures as follows, to wit:

EXHIBIT "A."

This agreement, made on this, the first day of May, A. D. 1888, by and between Harry Whigham, of Raton, New Mexico, as receiver of the Maxwell Land Grant Company, and approved by M. P. Pells, as agent of the income bondholders of the Maxwell Land Grant Company, party of the first part, and C. C. Strawn, of Pontiac,
96 Ill.; W. L. Johnson, of Chicago, Ill.; M. W. Mills, of Springer, N. M., and such other persons as they may associate with them, which persons will hereafter, by a separate writing, make themselves parties to this contract, parties of the second part:

Witnesseth, that, whereas, on the 18th day of August, A. D. 1885, by the order of the district court of the first (now the fourth) judicial district of the Territory of New Mexico, sitting within and for the county of Colfax, made and entered in a certain action therein pending wherein Thomas J. Wright and others were complainants, it was, among other things, ordered and decreed that he, the said Harry Whigham, be appointed to receive the rents and profits of the real estate, freehold and leasehold, and to collect and get in the personal estate of the said Maxwell Land Grant Company, a certified copy of which order is hereto attached and made part hereof, as Exhibit "A;" and

Whereas, by the further order of said court, made and entered on the 31st day of May, A. D. 1887, it was further ordered, adjudged and decreed that the said Harry Whigham, as such receiver, be authorized to sell and execute deeds for the lands within the outboundaries of the tract of land known as the Beaubien & Miranda, or Maxwell land grant, situated in the Territory of New Mexico and

the State of Colorado; provided, however, that such deeds, before being delivered, shall be approved by the said M. P. Pells, as agent of the income bondholders of the said Maxwell Land Grant Company, as aforesaid, and that such deeds shall receive the approval of the said district court, a certified copy of which last order is hereto attached and made part hereof, as Exhibit "B;" and

Whereas, the contract heretofore made between the said Harry Whigham, receiver, and the said M. W. Mills, of date December 1st, 1887, of and concerning about seventy thousand (70,000) acres of the land hereinafter mentioned, has been mutually surrendered and cancelled by the parties thereto, and is by these presents cancelled, set aside and abrogated; and

Whereas, the party of the first part, with a view of selling at an enhanced value certain lands, amounting to about twenty-two thousand (22,000) acres, lying east of the Ponil river, north of the Cimarron river, and west of the right of way of the New Mexico & Southern Pacific Railroad Company, and within the outboundaries of that portion of said land grant situate in the county of Colfax, in the Territory of New Mexico, and being duly authorized in the premises by said orders of said court, has projected a plan for the construction of large irrigating canals, ditches and reservoirs attached thereto, which said canals, ditches, reservoirs, are estimated,
97 in the judgment of experts, well qualified to make such estimates, who have carefully surveyed the same, to cost about fifty-six thousand dollars ($56,000.00); and

Whereas, the party of the first part is also desirous of and is duly authorized in the premises by said orders of said court, to dispose of other lands within that part of said land grant, within the Territory of New Mexico, lying in a body, and containing in all one hundred and ten thousand (110,000) acres, more or less, of unsold lands, bounded on the north by the line dividing townships numbers twenty-eight (28) north and twenty-nine (29) north, ranges numbers twenty-three (23) east and twenty-four (24) east, United States surveys, and bounded on the east by the east line of said land grant, and bounded on the south by the south line of said land grant, and bounded on the west by the line of the right of way of the New Mexico & Southern Pacific Railroad Company, (commonly called the Atchison, Topeka & Santa Fe Railroad Company); and

Whereas, the parties of the second part are desirous of engaging in the enterprise of developing and selling all the lands above described, and for that purpose have viewed the lands and investigated the circumstances and conditions appertaining to the same:

Now therefore, in consideration of the surrender and cancellation of the said Mills contract, as aforesaid, and the further consideration of the obligations hereinafter mentioned, to be kept and performed by the said parties of the second part, the said party of the first part agrees to and with the said parties of the second part, that he will reserve, set apart and hold from sale, except as hereinafter provided, said twenty-two thousand (22,000) acres of land under the ditch system hereinafter provided; provided, however, that the said party of the first part hereby reserves to the said Maxwell Land Grant

Company and its successors and assigns, out of the said tract of twenty-two thousand (22,000) acres, two thousand (2,000) acres under said ditch system, with a perpetual right to the use of the water of said ditches for the same without compensation, but otherwise upon the same terms and conditions as made to purchasers herein to be first selected in sections numbers twenty-one (21), twenty-two (22), twenty-seven (27), twenty-eight (28), thirty-three (33), and thirty-four (34), in township number twenty-six (26) north, range number twenty-one (21) east, of the second guide meridian east in the county of Colfax and Territory of New Mexico, for the sole benefit of the Maxwell Land Grant Company, without compensation; and, provided, further, that the parties of the second part shall within thirty (30) days after said ditch system has been finally located and the detail plans and specifications thereof have been completed
98 and submitted for the execution of the work, select lands under the said ditch system until they have selected the full amount of twenty thousand (20,000) acres from any lands under said ditch system, whether the same be east or west of the said right of way of the New Mexico & Southern Pacific Railroad Company, for their disposal, as herein provided:

And, the party of the first part in further consideration of the covenants herein to be kept and performed by the parties of the second part, does also agree to grant and convey by a proper instrument in writing, to a trustee to be appointed by the parties hereto, who shall hold the franchise for the joint benefit of both parties to this agreement, and issue certificates of ditch ownership as hereinafter provided, the right to take all the water which may flow in the Cimarron river at and below the mouth of the Ponil river, excepting so much thereof as may be held to legally belong to the vested right of any person or persons having lands on the stream below, and without prejudice to the water rights or privileges now in use of any person or persons holding or claiming, rightfully or wrongfully, as the case may be, lands of the said Maxwell Land Grant Company or its predecessors, and the grantees of said persons on said Cimarron and Ponil rivers and their tributaries, above the mouth of the said Ponil river:

And, in consideration of the herein-described valuable rights and privileges granted by the party of the first part, the parties of the second part hereby agree to provide without delay, the sum of sixty thousand dollars, ($60,000) or so much thereof as may be necessary, and to use the same in constructing in a good and workmanlike manner, the system of canals, ditches and reservoirs, upon the lands indicated by Exhibits "C" and "E" hereafter made a part hereof, and according to the detail plans and specifications, to be hereafter prepared by E. H. Kellogg, C. E., who is hereby mutually chosen and appointed by the parties of the first and second parts, as the engineer to superintend and approve the construction of said system of canals, ditches and reservoirs, and which detail plans and specifications shall be in harmony with, and not exceed the plans indicated in the transcript from the report and sectional plat of said E. H. Kellogg, hereto attached and made part hereof; as Exhibits

"C" and "E:" The work of constructing said canals, ditches and reservoirs to be at the sole and exclusive cost and expense of the parties of the second part, and the same to be commenced on or before the 15th day of July, A. D. 1888, and completed within six (6) months from that date, or as soon thereafter as the same can be well, properly and economically done when vigorously prosecuted, considering the nature of the work and the character of the season; and, provided, the construction of the said canals, ditches and reservoirs shall not cost to exceed said sum of sixty thousand dollars ($60,000):

99

And, the parties of the second part, further agree that they will at their own and sole cost and expense, use their best efforts to sell all of said twenty thousand (20,000) acres of land coming under said canals, ditches and reservoirs to purchasers for *bona fide* cultivation, settlement or occupancy, only in alternate sections, so far as it may be practicable and expedient so to do, and that all the same shall be sold at the earliest time hereafter possible, in accordance with the terms of this agreement, by the parties of the second part, for not less than one-fifth ($\frac{1}{5}$) in cash in hand at time of sale, the balance due to be paid in not exceeding ten (10) annual installments, each evidenced by two (2) promissory notes for the deferred payments, bearing seven (7) per cent. interest annually, each note to be for one-half ($\frac{1}{2}$) of any such annual deferred payment, and each note to be secured by a trust deed containing full, adequate and ample powers of sale in case — default in payment by the purchaser or purchasers, of any installment of principal or interest running to a trustee, to be mutually agreed upon and appointed hereafter, as the mutual trustee of the parties of the first and second parts, or the holder or holders of such promissory notes so secured as aforesaid, and a sufficient deed in fee-simple with full covenants of warranty of the premises sold, free and clear of all liens and incumbrances, except as to the reservations herein specified, and delivered to the purchaser or purchasers by the party of the first part, upon receipt by said trustee of *of* the said cash payment, and the execution and delivery by the purchaser or purchasers of the notes evidencing the deferred payments, and the trust deed securing the payment of the same with interest as aforesaid, and each cash payment and the said notes evidencing the said annual and deferred payments to be immediately distributed and delivered one-half ($\frac{1}{2}$) of the cash payment, and one (1) of the notes, evidencing one-half ($\frac{1}{2}$) of each annual deferred payment, to the party of the first part, the other one-half ($\frac{1}{2}$) of the cash payment, and the other of the notes evidencing one-half ($\frac{1}{2}$) of each annual payment to the parties of the second part to this contract, at the time of the receiving of said cash payments, and the taking of the said notes secured as aforesaid; the objects and purposes of the parties to this contract being, that, the parties of the first and second parts, shall each share equally in the proceeds of the sales of said lands, under said ditch system, and that the equal share of each party shall be received by each party at the time of the transaction as aforesaid.

And it is also mutually agreed between the parties hereto

that as each annual payment becomes due, each party, or in
100 case of the assignment of the notes so due and unpaid, then the holder of such note or notes shall have the right to demand and receive payment of the same, and in case of default in such payment to require the trustee to proceed to collect any such defaulted note or notes with the costs, attorneys' fees and damages named in said trust deed, by foreclosure of such trust deed and enforcement of the powers of sale therein contained for the use and benefit of the holder or holders of any such defaulted note or notes, and when collected said trustee shall immediately pay the amount of collection to the holder or holders of such defaulted note or notes, less such portion of said costs, attorneys' fees and damages as may be stipulated between such holder or holders of such defaulted note or notes and such trustee, shall be retained by such trustee as his compensation in the premises;

And, it is further mutually agreed between the parties hereto, that none of the lands under said irrigating ditch system shall be sold for less than the average price of fifteen dollars ($15.00) per acre, including the perpetual water privilege from said ditch system; provided, that if after such ditch system shall have been completed and the water turned in and the extent of the utility of the same demonstrated or ascertained, it shall be found that said land, notwithstanding the use of vigorous efforts upon the part of the parties of the second part will not sell at said average price of fifteen dollars per acre, then the parties to this contract shall mutually fix upon a less price for which said lands may and will sell in the market, and the party of the first part in such event having the preference to purchase at such mutually reduced price;

And, it is further mutually agreed between the parties hereto, that the party of the first part and the parties of the second part shall each pay one-half ($\frac{1}{2}$) of all the taxes lawfully assessed on the total valuation of all the unsold lands remaining from time to time, and that each party shall also pay one-half ($\frac{1}{2}$) of all the taxes that may be lawfully assessed upon any interest they may have remaining from time to time in said irrigating plant, including canals, ditches and reservoirs, if it shall be found that the same is lawfully assessable for taxation as independent and separate from the realty enhanced in value by the same;

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations, without compensation as to any of them, be and forever remain to and with the said The Maxwell Land Grant Company, which perpetual rights and reservations shall be contained in all deeds to all purchasers as covenants upon such purchasers and their grantees, running with the land:

101 First. The use of sufficient water from all streams, canals, ditches and reservoirs, for town, city and manufacturing purposes, excepting water power;

Second. Sufficient water for cattle, horses and other stock, with necessary access and right of way thereto along the said streams, canals, ditches and reservoirs and all of them, such access and

right of way to be, as soon as may be hereafter designated, with the view to as little inconvenience as possible to actual cultivators, settlers and occupants. The parties of the second part, or the grantees of the said land under this contract, to receive notice of such access and right of way from the party of the first part:

Third. The exemption of the said The Maxwell Land Grant Company from liability to damages by the cattle, horses or other stock of said company to crops upon any and all of the aforesaid lands:

Fourth. All the cement-rock rights heretofore granted to the Springer Cement Company on the lands aforesaid:

Fifth. Twenty (20) feet on each side of each section line east and west and north and south, through said lands, to be dedicated to the public as right of way for public highways; also, twenty (20) feet on the lower side of all canals and ditches and around all reservoirs herein mentioned, to be used by superintendents and workmen and others in repairing said canals, ditches and reservoirs, and in superintending the same. Also, one hundred and twenty-five (125) feet on either side of the section line east of the township line between ranges numbers twenty-one (21) and twenty-two (22), to be used by the Maxwell Land Grant Company as a cattleway; also, one hundred and twenty-five (125) feet of land on either side of the section line two (2) miles east of the township line dividing ranges numbers twenty (20) and twenty-one (21) east, to be used by the said company for the same purpose. Said cattleways run north and south, and are to run through any of the lands selected under this contract which may be located on said section lines:

And, it is further mutually agreed between the parties hereto, that the following perpetual rights and reservations not to be incorporated in deeds to purchasers under this contract shall be and forever remain to and with the said Maxwell Land Grant Company, without compensation from said company:

The right to graze on any and all the lands remaining unsold on both of the tracts referred to herein, viz., the tracts including one hundred and ten thousand (110,000) acres and the twenty thousand (20,000) acre tract:

It being estimated that the capacity of the said irrigating
102 system, ditching and reservoirs may ultimately be equal to serve thirty thousand (30,000) acres, it is hereby mutually agreed that the parties of the second part shall on or before the 1st day of October, A. D. 1889, have the option to select seven thousand (7,000) acres more of land from the adjacent unsold lands of the Maxwell Land Grant Company, suitable for irrigation, and if the parties of the second part shall exercise such option, then the party of the first part shall reserve such selected lands for the use of the parties of the second part upon the same terms as they take the lands under the said ditch system. Provided, if at the expiration of five (5) years from the date hereof, the parties of the second part shall elect to expend an additional sum of twenty-one thousand dollars ($21,000) in increasing the supply of water service of said system, by the building of storage reservoirs on the upper courses of

the streams, or by other methods equally serviceable and mutually approved by the parties hereto, then said parties of the second part shall have said seven thousand (7,000) acres of land, and otherwise not:

And, it is further mutually agreed, that every purchaser of land under said ditch system, shall have conveyed to him by proper certificate of ownership, a perpetual right running with the land purchased in the canals, ditches and reservoirs of said system in such proportion as thirty thousand (30,000) acres bears to the whole water supply, (it being estimated that thirty thousand (30,000) acres may be the ultimate capacity of said ditch system), that is, if such purchasers should buy one hundred acres of land he would be entitled to a one three-hundredth ($\frac{1}{300}$) part of all the water, and a like interest in all the plant, of said system, except that the ice which may form upon said reservoirs, is hereby forever reserved, to the parties of the first and second part, in equal shares, which mutual reservation shall also be incorporated in the deeds to all the purchasers:

And, it is further mutually agreed, that all purchasers of land under said ditch system, be further required to pay in the proportion specified in the last preceeding paragraph all repairs on said canals, ditches and reservoirs as the same may be from time to time required for the perfect maintainance and the preservation of such canals, ditches and reservoirs, and also to pay all taxes, in the same proportion, that may be lawfully assessed upon the said canals, ditches and reservoirs, and the right of way and the franchise thereof, if in law any such taxable franchise shall be found to exist:

And, it is further agreed, between the parties hereto, that such purchasers shall not receive their certificate, or be entitled to vote their interest in said ditch system, until their land shall be fully paid for.

103 And, it is further agreed between the parties hereto, that if the construction of the canals, ditches and reservoirs mentioned, should at the completion be found to cost less than sixty thousand dollars ($60,000), and that after such complete construction it should be satisfactorily shown that these canals, ditches and reservoirs were of insufficient capacity to give water service for twenty-two thousand (22,000) acres, within three (3) years after such complete construction, then the parties of the second part, shall invest such unused part of the said sixty thousand dollars ($60,000), in constructing such further ditches, reservoirs or reinforcements to the same as may be necessary to bring the whole of the twenty-two thousand (22,000) acres under sufficient irrigation:

(5.) As to the one hundred and ten thousand (110,000) acres, more or less, of unsold lands embraced within the boundaries hereinbefore described, in consideration of the agreements and obligations of the parties of the second part hereinafter contained, it is covenanted and agreed on the part of the party of the first part, that he will set over and deliver, and he does hereby set over and deliver, to the parties of the second part, the said one hundred and ten thousand (110,000) acres, more or less, except such part thereof, as may come under the said ditch system, and be selected by the

parties of the second part, as provided in the first section of this contract, for the sale upon the terms and conditions hereinafter stated, and in consideration of the covenants and agreements contained in the last preceding paragraph, and hereinafter contained, on the part of the party of the first part, the parties of the second part hereby covenant and agree that they will use their best endeavors to sell and dispose of said one hundred and ten thousand (110,000) acres, more or less of land, less the exception therefrom aforesaid, and that they will immediately upon the execution of this contract, set about, and undertake the sale and disposal of said last-mentioned lands, and that hereafter they will continue to contribute their best efforts, skill and ability so to do, until the whole of said lands are entirely sold and disposed of, as best may be under the following terms, conditions and restrictions, that is to say:

The average grade price per acre of all of the lands south of the north line, of township number twenty-six (26) running east and west, through said one hundred and ten thousand (110,000) acre tract, shall not be less than two dollars and fifty cents ($2.50) per acre, and the average grade price per acre of all the lands north of said north line of said township, shall not be less than three dollars ($3.00) per acre, and out of the proceeds of all said sales, the party of the first part, shall at the time of each sale receive the average grade price of the particular tract out of which the particular sale is made, and one half (½) of the gross sum realized above these average grade prices, and the parties of the
104 second part shall also at the time of each sale, receive and have to and for their own exclusive use and benefit the other one-half (½) part of said gross sum above said average grade prices realized from such sales; and if said tracts of lands shall be subdivided and sold in small tracts (as it is understood will be done so far as may be practicable and consistent with the objects of this contract), the prices per acre are to be so averaged and placed on the uplands and on the bottom lands of said two last-named tracts, severally, that the said party of the first part, will be enabled to realize the said average grade prices on said tracts, severally excepting such portion or portions thereof, as may be under said ditch system, and selected by the parties of the second part, under the first section of this contract; and if the better subdivisions of said tracts of land shall first be sold and disposed of, it shall be at prices sufficiently in advance of said several average grade prices, so as to insure the sale of the remaining and poorer subdivisions, or portions of said several tracts at a price that will realize to the party of the first part, said average grade prices severally: and the lands in said several tracts, shall be sold free and clear of all liens and incumbrances for cash in hand, or part cash and the balance in deferred payments, bearing interest at the rate of seven (7) per cent. per annum, by good and sufficient deeds in fee-simple with full covenants of warranty, and taking from the purchasers promissory notes for said deferred payments with interest at seven (7) per cent., and a trust deed with full powers of sale, securing such notes, the same in detail as is provided for as to the sale of the lands under

the said ditch system mentioned in the first section of this contract; the deeds to such purchasers to be duly executed and delivered by the said party of the first part to the purchasers at the time of payment of the purchase price in cash, or in part cash, which said part cash however, shall never be less than one-fifth ($\frac{1}{5}$) of the whole of the purchase-money, and part notes secured by trust deeds as aforesaid, and the proceeds of such sales shall be distributed among and delivered to the parties of the first and second parts both as to the cash payments and deferred notes in proportion to the interests of the parties hereto in each sale, that is, if one-fifth ($\frac{1}{5}$) part of the purchase-money be paid in cash, then one-fifth ($\frac{1}{5}$) of the average grade price of the tract out of which said sale shall be made, shall first be delivered out of said cash payment to the party of the first part, and the balance then be equally divided, and if the remainder be in ten (10) payments by note, one-tenth ($\frac{1}{10}$) of the remaining four-fifths ($\frac{4}{5}$) of said average grade price or premium sum and one-twentieth ($\frac{1}{20}$) of the remaining unpaid profits shall be put in each of the annual notes to be delivered to the party of the first part, and a series of annual notes shall be delivered to the parties of the second part, each note representing one-twentieth ($\frac{1}{20}$) part of the total of the unpaid
105 profits: And it is hereby mutually agreed between the parties hereto that the person or persons who may be chosen as trustee or trustees under the provisions of this contract as to the lands under said ditch system, shall by virtue of such choosing and appointment be and act as the trustee or trustees for the trust deeds taken from the purchasers of the lands embraced in this section of this contract: And it is further mutually agreed between the parties hereto that the party of the first part shall pay all taxes that may be assessed upon all unsold portions of said tract of land, and that he will bear all necessary expenses of litigation in protecting the said tract of land from encroachment by trespass or by squatters, under whatever right they may claim, and in maintaining the purchaser or purchasers of the same or any part thereof, in full and peaceable possession and complete title of the same, so that possession and title can be given to the purchaser or purchasers free from any lien or incumbrances whatsoever: And the parties of the second part shall in no event become purchasers of said lands or any part thereof, directly or indirectly without the written consent of the party of the first part first had and obtained:

And it is further mutually agreed between the parties hereto, that the said parties of the second part shall bear all expenses of negotiating, disposing of and selling the said tracts of land and all portions thereof, including all expenses of subdividing in smaller tracts than one hundred and sixty (160) acres, of traveling, advertising, commissions of sub-agents making contracts, and all other expenses incident to the sale of said lands:

And it is mutually agreed between the parties hereto, that in the event that the proceeds of the sales of said lands do not exceed five (5) per cent. in excess of said average grade prices per acre upon a fair average market value of all the lands in said tracts severally,

then the party of the first part shall pay such five per cent. to the parties of the second part, upon all sales made at the expiration of each and every three (3) months from the date of this contract and during the continuance thereof, as the total compensation of the parties of the second part in the premises:

And it is further agreed between the parties hereto, that if it shall at any time clearly appear that the lands being sold are of a higher value than the average of the whole value of the lands, the party of the first part shall have the right to withhold from the share of the parties of the second part a sum proportionately equal to what the average value of the remaining unsold lands may be, less than the total average premium price of the particular tract, of said two tracts, in which the sales are made; and the parties of the second part further agree that they will prosecute the sale of said lands vigorously and complete, and conclude the sale of the entire
106 tract at as early a day as practicable under the terms and conditions and restrictions imposed, and that the one-seventh ($\frac{1}{7}$) of the whole body of land in the two (2) tracts, or thereabouts, shall be sold each year, but in no case shall more than one-quarter ($\frac{1}{4}$) of the whole of said two (2) tracts be sold in any one year, and the entire tract be sold and disposed of within six (6) years from the date of this contract, and no part shall be sold at a price less than the market price of these or surrounding lands:

And it is further understood and agreed that to enable the parties of the second part to more effectually carry out the terms, conditions and spirit of this contract, they are hereby duly made, constituted and appointed the agents of the party of the first part to do and perform, in accordance with the terms of this agreement, any and all acts necessary to be done and performed in the premises, in order to carry out the stipulations and agreements herein contained to the true intent, meaning and spirit hereof, hereby confirming any and all acts they may do or cause to be done in conformity with the agreements herein contained:

It is understood and agreed that all the stipulations, covenants and agreements, herein contained and required of the said party of the first part, shall extend to and be binding upon the said party of the first part in his respective official or representative capacity, as also that of M. P. Pells as agent of the income bondholders of the Maxwell Land Grant Company, who approves this instrument, and each of them as herein recited, and shall also include, bind, extend to and mean, as well the said Maxwell Land Grant Company, and as well also the income bondholders of the said Maxwell Land Grant Company, and the heirs, executors, and administrators, successors and assigns of each of them, as fully and completely as if they had been fully mentioned along with the said party of the first part each time hereinbefore:

And wherever, in this agreement, the parties of the second part are mentioned it shall be held as well to refer to and to bind and be for the benefit of each and every one of the said parties of the second part, their heirs, executors, administrators, successors or assigns, the same as though they had been in each and every case herein-

before specifically stated, and wherever the Maxwell Land Grant Company is mentioned herein it shall include its successors and assigns.

In witness whereof the said party of the first part, and also the said parties of the second part have hereunto set their hands and seals on the day and year first above written.

107 The title of the lands at that time and at all times afterwards was and remained in the Maxwell Land Grant Company, except as to the rights acquired by Strawn and associates and their successors in interest under said contract. The same contract constituted Strawn and his associates and successors in interest the agent of the Maxwell Company to the extent of and for the purpose of carrying into effect the spirit and intent of the contract as to the sale of the said lands, but that party, the Springer Land Association, had no other title in the lands than as given by said contract.

Five days subsequent to the making of his grading contract complainant Ford entered into another contract with the Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of eight thousand dollars, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch.

The said contract of May 1, 1888, designated one E. H. Kellogg as the engineer to have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Springer Land Association of October 20, 1888, but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer.

Ford let subcontracts for portions of the work to McGarvey, Dargle, and Haynes. His contract with Dargle was in the following terms:

108 (Copy.)

COMPLAINANT'S EXHIBIT 17.

L. Griffin, stenographer.

Contract and Specifications for the Construction of a Portion of the Cimarron Ditch.

Contract.

This agreement, made and entered into this 21st day of November, A. D. 1888, by and between Henry Dargel (subcontractor) party of the first part, and P. P. Ford, party of the second part, and approved by E. H. Kellogg, the civil engineer for the Springer Land Association,

Witnesseth: That for and in consideration of the covenant and agreements hereinafter set forth, the parties hereto mutually agree and bind themselves as follows:

The said party of the first part agrees to furnish all necessary

tools and labor, and to do the work of grading on the embankment of reservoir No. seven (7) between station number 36 and station number 40, all in strict conformity to the specifications hereto attached and made part of this contract.

The said party of the first part further agrees to begin said work within one days after signing of this contract, and to complete the same as far as station 33 on or before March 1st, 1888, and to complete the whole on or before May 1st, 1888.

The said party of the second part agrees to pay for the work so done, at the rate of ten (10) cents per cubic yard, as follows: The estimate for the work of each calendar month will be paid by the company on or before the 10th of the month following that in which the work is done: As soon as such estimate is paid, the said party of the second part will pay to the said subcontractor the amount of his subestimates, less 10 per centum retained, as detailed in the specifications.

It is mutually agreed that the amounts of these subestimates will in no case be demanded or paid in advance of the payment of the regular estimate.

Witness our hands and seals this 21st day of November, 1888.

H. DARGEL. [SEAL.]
P. P. FORD. [SEAL.]

Approved:
E. H. KELLOGG.

The contracts with McGarvey and Haynes were of like form and tenor, and were also approved by said E. H. Kellogg. Estimates as provided by the contract of October 20th, 1888, were made by said Kellogg, supervising engineer, from time to time, which were audited and paid by the Springer Land Association up to about May, 1889. Estimate No. 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving ten per cent., to be $5,010.92. The amount of this estimate has never been paid.

On June 13, 1889, the said engineer gave to said Ford a written acceptance of the work and a final estimate, which acceptance and estimate are in the following terms:

109 EXHIBIT "33" T.

Final Estimate.

SPRINGER DITCH,
ENGINEER'S OFFICE, *June* 13, 1889.

I certify that P. P. Ford, contractor, has completed the earthwork on the Springer ditch and reservoirs under his contract, that the same has been accepted by me, and that he is entitled to compensation in final settlement therefor for four hundred and forty-one thousand three hundred and ninety-six (441,396) cubic yards of excavation and embankment.

E. H. KELLOGG, *Engineer.*

Statement.

441,396 cu. yards, at 11c..... $48,553 56

Less am't of previous payments:

Estimate No.	1	$6,081	77
"	2	9,501	74
"	3	6,628	33
"	4	4,381	25
"	5	4,324	02
(Over.)			
Springer Land Ass'n, est. No. 6, not paid		5,010	92
			35,928 03

Am't due and now payable..... $12,625 53

No. —.

P. P. Ford. Final estimate to June 13, 1889, $12,625.53.

The total amount stated to be due to Ford by said engineer's estimates at the date of acceptance of the work by the engineer was $17,636.45. This amount the Springer Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to the contract; that the engineer's final estimate was erroneous either through fraud, inadvertance, or mistake, because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens, and also that Ford should accept the section of land which he had agreed to accept and which he had previously selected in payment of $8,000 of the amount of such final estimate.

The Springer Land Association procured to be made and properly executed a deed of conveyance by the Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by said Ford, and had the said deed present in the hands of an agent of said Maxwell Company on June 19, 1889, when the representative of the Springer Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon payment to the agent of said Maxwell Company by the Springer Land Association of $4,000. The representative of the Springer Land Association had with him at that time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4,000 to the agent of the Maxwell Company for the deed if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4,000, which Ford disputed as to $300.00 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and res-

ervoir for the amount of his claim. The agent of the Springer Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Springer Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The said disagreement between Ford and Subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. The representative of the Springer Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him in law to accept it. The amounts claimed by the several subcontractors at that time were as follows:

McGarvey	$4,308 72
Dargle	2,279 00
Haynes	800 00
Lane	150 00
Total	$7,537 72

Thereupon, on July 3rd, 1889, complainant Ford filed his notice of claim of lien for $17,634.27 alleged to be due on the contract, including all moneys due subcontractors at that time and $390.00 for extra work; which notice was as follows:

111 *Copy of Claim of Lien.*

TERRITORY OF NEW MEXICO, }
County of Colfax, } *ss:*

PATRICK P. FORD, Contractor,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. Barnes, Melville W. Mills, William J. Tewksbury, Frederick J. Eames, William A. Comstock; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company; Rudolph V. Martensen, Chas. Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of the Maxwell Land Grant Company, Owners or Reputed Owners.

This is to give notice that Patrick P. Ford hereby files this, his claim of lien, as an original contractor, with the county recorder of the county of Colfax, Territory of New Mexico, against all that certain ditch, canal and reservoir, commonly known as the Cimarron ditch and its accessories, the said ditch beginning at a point where the Ponil and Cimarron rivers meet to form the Cimarron, thence continuing in a devious course eastwardly to a point on the Atchi-

son, Topeka & Santa Fe railway, about five miles northeast of the town of Springer, in the county of Colfax, Territory aforesaid, being in length about 26 miles; and the said ditch and land appurtenant thereto for right of way, being of about the uniform width of sixty feet, together with all lateral ditches and reservoirs, and the land covered by, and appurtenant to the same, as aforesaid, as also twenty-two thousand acres of land appurtenant to said ditch, the said land being also in said county, and under the ditch to be irrigated thereby, and described according to the townships and sections, to wit:

Sections 30, 32, 33, 28, 22, 23, 26, 24, 25, 36, 27, 31, 4, 3, 10, 2, 1, 12, 5, in township 26 north, range 21 east, and sections 30, 31, 29, 32, 33, 34, 35, in township 26 north, range 22 east. And sections 2, 3, 10, 11, 14, 17, 18, 7, 6, 5, 15, in township 26 north, range 22 east; and sections 20, 21, 22, 23, 26, 25, 36, 35, 27, in township 25 north, range 22 east, all of which ditch, laterals, reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien, to secure the payment of the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents ($17,634.27), the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said The Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars ($390.00), for extra excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract; all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past, the said work being on the said last date then completed and accepted, the same being within ninety days from the completion of said ditch.

The names of the reputed owners of the land hereinbefore mentioned are the Maxwell Land Grant Company, Rudolph V. Martensen, Charles Fairchild, Nicholas Thuron, Samuel L. Parrish, Martinus P. Pells, Henry W. Porter, and Frank Springer, trustees of said company acting under the name, style, and title of the board of trustees of the Maxwell Land Grant Company.

Claimant was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president.

The terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof.

PATRICK P. FORD.

TERRITORY OF NEW MEXICO, }
County of San Miguel, } ss.:

Patrick P. Ford, being duly sworn, doth depose and say that he is the claimant above named, and that he has read the foregoing

claim of lien, and that the facts therein stated are true, except such facts as are stated upon information and belief, and that as to such facts he believes them to be true.

Witness my hand and seal, at Las Vegas, N. M., the second day of July, A. D. 1889.

CHARLES RUDULPH,
[SEAL.] *Notary Public.*

Commission expires March 23rd, 1892.

112 To said notice was attached a copy of the contract of October 20, 1888, and the specifications.

On July 25th, 1889, Subcontractor McGarvey filed a notice of lien upon the same property mentioned in Ford's claim of lien for $5,000.00, alleged to be due him from Ford upon said work, and he made a second filing for the same claim on August 5th, 1889.

On August 1, 1889, Subcontractor Dargle filed his notice of lien on the same property for $2,279.30.

All of said notices of lien were filed in the office and within the time prescribed by law. Suits were commenced to foreclose these liens as follows:

By Dargle, February 28, 1890.
By Ford, June 30, 1890.
By McGarvey, July 22, 1890.

All of said suits were begun within the time limited by law. Dargle's suit was still pending at the date of the decree in this suit.

It appears by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs—were under said ditch and to be irrigated thereby; that the same were included within the sections described in the notice of lien and bill of complaint. It does not appear that the particular sections described were selected or segregated by the Springer Land Association under its contract of May 1, 1888, as capable of irrigation, and it does appear that in a number of the said sections only portions of the section were selected, because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch. All of said sections were situated between the line of said ditch and the river and were enhanced in value by reason of its construction.

It appears that complainant Ford paid to his several subcontractors all amounts due them under the first five monthly estimates, but at the time of the commencement of this suit had
113 not paid what was due them under the sixth estimate (May, 1889) nor under the final estimate of June 13, 1889.

The evidence does not sustain the allegations of the cross-bill that complainant, Patrick P. Ford, entered into a fraudulent arrangement with said Kellogg, engineer in charge of said work, or that he was in collusion with said Kellogg as to the amount of work performed by said Ford under said contract, or as to the completion of said work, or that by reason thereof he procured said Kellogg to

make overestimates as to the amount of work done from time to time, or a false and fraudulent final estimate on account of said work, or that said Kellogg entered into a conspiracy with Ford to defraud defendants, or that said Ford combined with said Kellogg or procured him to make a final estimate of said work or to deliver it to said Ford, or that said Kellogg was dishonest or incompetent. As to whether the work was completed according to the contract and specifications there is a vast amount of conflicting expert testimony. The evidence against the proper completion of the work is not sufficient to overcome that of the engineer in charge, and the court finds that acceptance by the engineer in charge, being free from fraud or dishonesty, is conclusive, and that the amount shown by his estimates is correct.

THOMAS SMITH,
Chief Justice, &c.,
Per N. B. L.

114 And be it further remembered that on the 28th day of August, 1895, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the opinion of the court in said cause, which is annexed hereto in accordance with rule 8 of the Supreme Court of the United States, and is in the words and figures following, to wit:

115 In the Supreme Court of the Territory of New Mexico, at the July Term, 1895.

PATRICK P. FORD, Appellee,
versus
THE SPRINGER LAND ASSOCIATION *et als.*, Appellants.
} Appeal from the District Court, Colfax County.

Statement of the Case.

This is an action in chancery brought by Patrick P. Ford, appellee, against The Springer Land Association and certain individuals corporate thereof, together with the Maxwell Land Grant Company and its trustees, to establish, fix, and foreclose a mechanics' lien upon a certain ditch and reservoir system, rights of way therefor, and certain lands alleged to be appertenant thereto, and it is founded on the following facts:

On October 20th, 1888, a contract was entered into between Patrick P. Ford, of the first part, and the Springer Land Association, of the second part, for doing the earth-work in constructing a certain ditch line and reservoir system for irrigation, all in the county of Colfax and Territory of New Mexico, the provisions of which, so far as pertenent to this case, are as follows:

The party of the first part to furnish all necessary tools and labor and perform all work of excavating and grading required in the construction of the Cimarron ditch and its accessories, said work to be done in a thorough and workmanlike manner and in full

accord with the specifications thereto attached and made part of the contract. * * *

The party of second part agreed to pay said party of the first part for the work so done at the rate of eleven cents per cubic yard for all earth removed, without clas-ification, amounts due for said work to be paid at the time and in the manner described in the specifications thereto attached.

"Specification 13. Subcontracts must be submitted to the engineer and receive his approval before work is begun under
116 them; no second subcontracts will be allowed; subcontractors will be bound by the same specifications as the original contractor and will be equally under the authority of the engineer."

"Specification 15. On or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof less ten per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfill his obligations will mean a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon the satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work."

The land upon which the ditches and reservoirs were to be and were actually located and constructed and upon which the improvements were actually made did not belong to the said The Springer Land Association, or to any of the parties to the contract, or to their successors in interest, so far as appears from the record, but was at the time the property of the Maxwell Land Grant Company, which was not a direct party to the contract. The Maxwell Land Grant Company did, however, make a contract on the first day of May, 1888, with C. C. Strawn and his associates, who afterwards organized the Springer Land Association, by which the Maxwell Company gave it and its associates a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was provided, among other things, that, with the view of selling certain of its lands at an enhanced value and in consid-
117 eration of certain perpetual water rights and franchises to be granted it by the other party, it agreed to set apart and reserve from sale about twenty thousand acres of its lands and to give the other party, the Springer Land Association, which succeeded to the rights of said Strawn and his associates under said contract, a certain portion of the proceeds which might be derived from the

sale of the said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement said Strawn and his associates agreed to expend about sixty thousand dollars or a sufficient sum to complete the enterprise on the proposed plan. The title to the lands at that time and at all times afterwards, so far as appears from the record, was in and remained in the Maxwell Company except as to the rights acquired by Strawn and his associates and successors in interest under said contract. The same contract constituted and made Strawn and his associates and successors in interest the agent of the Maxwell Company to the extent of and for the purposes of carrying into effect the spirit and intent of the contract as to the sale of the said lands; but that party, the Springer Land Association, contracting with the appellee Ford, had no other title in the lands than as given in that contract. Five days subsequent to the time the ditch contract was made Ford entered into another contract with the Springer Land Association, by which he agreed to select and take one section of the land, under the ditch system, at the stipulated price of eight thousand dollars, to be considered as part payment on the contract price for constructing the ditch system, and the Springer Association agreed to procure a deed to Ford from the Maxwell Company free from all incumbrances.

The work of construction proceeded under the Ford contract, and he let subcontracts to McGravey, Dargle, and Haynes. Estimates, as provided by the contract, were made by E. H. Kellog-, the supervising engineer, from time to time, which were audited and paid by the Springer Association up to about May, 1889, and the final estimates were made, including all balance alleged to be due on the contract and for extra work, and presented about the middle
118 of June of that year and at the time the contract work was alleged to have been completed, amounting to $17,634.27, due on the contract, and $390.00 for extra work, and which the Springer Association refused to pay on the grounds that the sum claimed was in excess of the amount due, and that the work had not been completed according to the contract; that the engineer's final estimate was erroneous in part, either through fraud, inadvertance, or mistake and because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens. Thereupon Ford, on July 3rd, 1889, filed his notice of claim of lien for $17,634.27, alleged to be due on the contract, including all moneys due subcontractors at that time, and for $390.00 alleged to be due him for extra work. Thereafter the subcontractors filed their notices of claim of lien on the property for moneys alleged to be due them, McGarvey for $5,000.00, Dargle for $2,274.30, and Haynes for an amount not shown by the record, all of which said notices were filed within the time prescribed by law. Soon thereafter suits were brought to establish and foreclose the several liens by the subcontractors, some of which were pending when this suit was brought, and all against the ditch laterals, reservoirs, and right of way, about sixty feet wide; the full length of the ditch, about twenty-six miles in length, and

against 22,000 acres of land alleged to be under the ditch system and to be irrigated thereby and appertinant thereto.

Ford filed his bill to foreclose the lien so claimed on June 30th, 1890, in which he set out his contract of October 20th, 1888, averred substantial compliance therewith, completion and acceptance of the same, but not by whom accepted; the filing of his claim of lien, the total amount due him at completion thereof, described the property as in the claim of lien, averred as to the contracts between the Maxwell Company, Strawn and his associates, and the Springer Association and its associates; that during all the time the Ford contract was being executed the Maxwell Company and the Springer Association both had full knowledge of the same, and that neither gave any notice that they would not be responsible for it; that at the time of the completion of the work there was due Ford from the Springer Association and the individuals composing it
119 $17,634.27 on the contract and $390.00 for extra work ordered by the supervising engineer in charge, with prayer for an accounting and foreclosure of lien, decree for payment of costs, solicitors' fees, sale of ditches, laterals and reservoirs, and the 22,000 acres of land described, and for a deficiency judgment in case the property when sold should not produce sufficient funds to fully satisfy the several amounts so found to be due against the Springer Land Association and its associates.

The Springer Land Association and the individuals composing it answered the bill and denied that the work was ever completed by complainant or accepted by defendants; denied that they were indebted to the complainant for said work in any sum or that any claim of lien was filed which would be effective to establish a lien on the ditch system or lands described therein; averred that the Maxwell Company owned the lands and had given the Springer Association the right to construct the ditches and reservoirs thereupon, but denied that the 22,000 acres of land *was* to belong to the Springer Association; averred that the final estimates made by the engineer were given for work never done or completed through fraud, negligence, mistake or inattention, or through the fraudulent procurement of the complainant; that under the contract the right to audit and determine the amount to be paid on the engineer's estimates rested with the Springer Association, and that it was not bound to pay on estimates made exclusively by the engineer; that under said contract defendants were not bound to pay final estimates made by the engineer except upon satisfactory showing that the work was free from all danger from liens or incumberances of any kind; that subcontractors had filed liens for about $10,000 against the property, upon some of which suits had been brought and were still pending; that complainant had failed to remove or to take steps to remove or to defend against said liens, by reason of all of which defendants were not bound to pay the final or any other estimates for said work.

These defendants filed a cross-bill, setting up matters averred
120 in the answer and other breaches by complainant Ford and the loss, damages, and expenses to the defendants by reason

thereof, with a prayer that in case an accounting should be decreed under the bill these matters should be considered and allowed as set-offs to Ford's claims and for general relief, but neither the Maxwell Land Grant Company nor any of its trustees filed any answer or other pleadings of any kind. Complainant filed general replication to the answer and answer to cross-complaint, and issue was joined on the general replication of defendants to cross-answer. The cause was then referred to W. E. Gortner, Esq., as special examiner, to take proof and report the same to the court. A vast amount of testimony was then taken, orally and by depositions, and a great number of exhibits were offered, the bulk of which was directed to the question of completion or non-completion of the work in compliance with the term- of the contract and specifications, the erroneous character of the final estimate by the engineer through mistake, inadvertence, or fraud. The record here consists of over twelve hundred closely printed pages.

The taking of proofs was closed and the case set down for argument and was argued before the court in vacation, and on March 28th, 1893, Chief Justice O'Brien rendered his decision in favor of the complainant and made his findings of facts and conclusions of law, and a final decree was thereupon enrolled establishing a lien on the entire ditch and reservoir system and rights of way and on the 22,000 acres of land for $22,097.75, including interest, being the amount claimed in the notice of lien, and which included all sums due him and due on all subcontracts, and out of this amount to pay into court a sum sufficient to satisfy Subcontractor Dargle on his subcontract lien in event that Ford did not pay the amount due to him and file Dargle's receipt in full for same, it then appearing that Ford had settled with all other subcontractors in full, and with interest to run at 6 % from date of decree for the debt, and $1,000 for complainant's solicitors' fees, and for all costs, and for a deficiency judgment in case the proceeds derived from the sale should not be sufficient to pay the several sums so found for complainant
121 against the Springer Land Association and its associates herein named, and for an order of sale and foreclosure; to all of which defendants excepted, and the case is accordingly here on appeal.

Defendants assigned errors sufficient to raise all the material issues in the cause as to its merits.

The cause was ably argued in this court at the July, 1894, term by Frank Springer, Long & Fort, and A. A. Jones, for appellants, and by Wolcott & Vaile, for appellee, and exhaustive briefs were submitted on both sides.

Opinion.

LAUGHLIN, *A. J.*:

This is an action in chancery, the purpose of which is to establish and foreclose a lien in favor of the appellee on the property of the appellants, as described in the notice of lien and in the bill of complaint, and upon the notice of lien the appellee must succeed or fail, and he must show that it is in substantial compliance with all

the material requirements of the law and the facts applicable to the subject.

The law providing protection to mechanics, materialmen, and laborers, by giving them a security on property upon which they have furnished material, labor, and skill for the enhancement of its value, requires nothing unjust to the owner and nothing unreasonable on the part of those who seek its protection in enforcing their remedy under it. Those who attempt to fix a lien and establish an incumbrance on property for the security of their just debts and demands, and thereby compel the owner to pay these obligations, which in many instances they never directly contract, must show affirmatively a substantial compliance with all the essential requirements of the statute under which they claim protection. The mechanics' lien law was unknown to and is in contravention of the common-law and equity jurisprudence. It had its origin with the civil law.

Canal Company *vs.* Gordon, 6 Wall., 561.
122 Minor *vs.* Marshall, 27 Pac. Rep., 481; 13 Pa., 167.

Yet it being remedial in its nature and equitable in its enforcement, is to be construed liberally. The equitable object of the act is clearly expressed in the first section in defining it: "Sec. 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act."

This court held, in Finane *vs.* Hotel Company, 3 N. M., 256, that the law should be construed strictly, but the weight of authorities is against it, and that decision to that extent is here overruled.

Baldwin *vs.* Merrick, 1 Mo. App., 281.
Tuttle *vs.* Moutford, 7 Cal., 358.
Barnes *vs.* Thompson, 2 Swan (Tenn.), 313.

"Notwithstanding the mechanics' lien law was unknown to the common law, yet, in view of the equitable character of the statute, it should be liberally construed, but cannot by construction be extended to cases not provided for by statute."

Barnard *vs.* McKenzie, 4 Colo., 251.
15 Am. & Eng. Ency. Law, 179, and cases there cited.

But the notice of claim of lien, being the foundation of the action, must contain all the essential requirements of the statute, and the failure or omission on the part of the person claiming the lien of any of the substantial requisits of the statute is fatal and will defeat the action.

The tenth assignment of error is that the court below erred in establishing any lien whatsoever on the real estate, ditches, and reservoir system described in the decree and entered in said cause. This raised the question of validity of the notice of claim of lien. The authority for filing a claim of lien is found in sec. 1520, C. L. 1884, and a ditch is therein enumerated as one of the various kinds of property subject to a lien, and it provides that every person who performs labor upon or furnishes materials to be used in or upon the construction, alteration, or repair of the several kinds of prop-

erty therein enumerated "has a lien upon the same for the work or labor done or materials furnished by each respectively,
123 whether done or furnished at the instance of the owner of the building or other improvement or his agent;" and sec. 1522, which provides that "the land upon which any building, improvement, or structure is constructed, together with a convenient space about the same or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work or of the furnishing of the materials for the same the land belonged to the person who caused said building, improvement, or structure to be constructed, altered, or repaired, but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien."

This section goes to the quantity of the property to be charged and to the interest to be conveyed to and vested in the purchaser at the foreclosure sale. Sec. 1524 says: "Every original contractor, within ninety days after the completion of his contract, and every person save the original contractor claiming the benefit of this act, must within sixty days after the completion of any building, improvement, or structure, or after the completion of the alterations or repairs thereof, or the performance of any labor in a mining claim file[d] for record with the county recorder of the county in which such property or some part thereof is situated a claim containing a statement of his demands, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, with a statement of the term, time given, and conditions of his contract, and also a description of the property to be charged with the lien sufficient for identification, which claim must be verified by the oath of himself or some other person."

It will be seen by this section that the notice of claim of lien must contain five essential allegations or averments, and each must be stated substantially in the language of the statute, but no particular form of statement is required. All that is necessary is that the language used in the statement must carry and express in an intelligent manner the meaning and intent of the statute. To hold otherwise would be in effect in many instances to defeat a just and equitable claim on mere technicalities. This the legislature did not intend. The best manner in which to determin- the validity of the notice of claim of lien in this case is to state each requirement of the statute and the averments in the notice of claim of lien applicable thereto, and this course will hereinafter — pursued.

This section is given in full, because the lien is based upon its requirements and must be tested by it, and on it the lien and the action as to the validity of the notice of claim of lien must stand or fall.

The record discloses that the notice of claim of lien was seasonably filed and recorded; that it was properly verified by the
124 oath of the appellee, and that the action on the same was commenced within one year thereafter and within the time prescribed by the statute.

But appellants contend that none of the other requirements in this section were complied with, and that therefore there never was nor is there now any lien at all on the property as described and herein sought to be charged. This controversy can only be determined by a careful comparison of the essential requirements set out in this section with the allegations in appellee's notice of claim of lien.

This section requires, first, "a claim containing a statement of his demands after deducting all just credits and offsets."

After describing the property the notice of lien says: "To secure the payment of the sum of seventeen thousand six hundred and thirty-four dollars and twenty-seven cents, the balance due and owing to said Patrick P. Ford by the aforesaid owner or reputed owner, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said The Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien, as also for the further sum of three hundred and ninety dollars for extra excavating and hauling ordered by the engineer in charge of said ditch and allowed him in pursuance of the provisions of the said contract; all of which having been begun on, to wit, the first day of November, 1888, and prosecuted continuously until the twenty-first day of June last past."

Second. "With the name of the owner or reputed owner, if known."

The notice of lien says, after naming the Springer Land Association, certain individuals connected therewith, the Maxwell Land Grant Company and certain individuals as its trustees, "owners or reputed owners," and further on it says the sum due and owing to said Ford "by the owners or reputed owners" of the land before described, and in closing it says, "The names of the reputed owners of the land hereinbefore mentioned are the
125 Maxwell Land Grant Company and certain persons therein named as trustees of said company, acting under the name, style, and title of the board of trustees of the Maxwell Land Grant Company." It is here seen that names of the owners or reputed owners of the lands are mentioned three times, and the proof shows and it is admitted by both parties that the twenty-two thousand acres of land sought to be subjected to the lien belong to the Maxwell Land Grant Company, and it is equally clear from the allegations, proofs, and admissions in the answer that the ditch system and right of way is the property of the Springer Land Association and of the individuals composing it; and as the notice of lien and bill of complaint used the language of the statute and is sustained by the proofs, it is sufficient.

Miner *vs.* Marshall, 27 Pac. Rep., 481.
Harrington *vs.* Miller, 4 Wash., 808.
Allen *vs.* Rowe, 23 Pac. Rep., 901.

Third. "And also the name of the person by whom he was employed or to whom he furnished materials."

The notice of lien says: "Claimant was employed to do said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president."

It would be difficult to observe that requirement more fully than it is by this statement, and it is sufficient.

Fourth. "With a statement of the terms, time given, and conditions of his contract." The notice of lien avers that "the terms, time given, and conditions of said contract are those that fully appear in the copy of the said contract, which is attached hereto and made a part hereof;" and by reference to the contract and specifications filed and recorded, with the notice of claim of lien, as a part thereof, it will be seen that the contract provides that "said party of the first part (appellee) agrees to begin work within ten days after signing this contract and to complete the same on or before July 1st, 1889. The party of the second part (the Springer Land Association) agrees to pay said first party for work so
126 done at the rate of eleven cents per cubic yard without classification, and the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached." By reference to the specifications it is found as follows, viz: "15 estimates; on or about the first day of each current month the engineer will measure and compute the quantity of material moved by the contractor during the preceding month. He will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum retained, will be paid to the contractor in cash within ten days thereafter. The retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfill his obligations will work a forfeiture of this retained percentage to the company. The amount due the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind through failure on his part to liquidate his just indebtedness as connected with this work."

The contract for the work was signed October 26th, 1888, and it here appears that the terms of the contract were eleven cents per cubic yard for all earth removed without classification, and the time given was ten days after the signing of the contract to the first day of July, 1889. The conditions of the contract were that the contractor should perform the labor in accordance with the contract and specifications, and that the company should pay him at the stipulated price from the first to about the middle of each month, in cash, for the work performed during the preceding month, less the retained percentage, which was to be paid with the final estimate when the work was completed on a satisfactory showing that the property was then free from all danger from liens and claims through the fault or neglect of the contractor.

127 But appellants contend with much earnestness that it was not a sufficient compliance with the statute to give the terms, time, and conditions of the contract by simply attaching the contract and specifications to the notice of claim of lien as a part thereof, and rely upon it as sufficient notice to the world of the contractor's claim of lien on the property sought to be charged, and that it would be too much to require persons searching the voluminous record of the notice of claim of lien, the contract, and specifications in a matter of this importance; but this contention cannot be maintained, because the searcher of the notice of the lien has his attention called to the contract as a part thereof, and the contract calls his attention to the specifications as a part of it, and on reading the entire record he is given full and ample notice of all of its conditions. This is the most satisfactory manner in which the public could possibly be advised of the notice of an intention to claim a lien and to fix an incumbrance upon the property therein described.

Knabb's appeal, 10 Pa. St., 186.

McLaughlin *vs.* Shaughnessey, 42 Miss., 520.

Phil. Mech. Liens, sec. 405.

Fifth. "And also a description of the property to be charged with the lien sufficient for identification."

The averment in the notice of claim of lien is that he, Fords, files his claim "against all that certain ditch, canal, and reservoirs, commonly known as the Cimarron ditch, and its accessories, the said ditch beginning at a point where the Ponil and Cimarron rivers meet to form the Cimarron rivers; thence continuing in a devious course eastwardly to a point on the Atchison, Topeka and Santa Fe railroad, about five miles northeast of the town of Springer, in Colfax county, Territory aforesaid, being in length about 26 miles,
128 and said ditch and land appurtenant thereto for right of way, being of the uniform width of sixty feet, together with all lateral ditches and reservoirs and the land covered by and appurtenant to the same as aforesaid, as also twenty-two thousand acres of land appurtenant to said ditch, the said land being also in said county and under the ditch to be irrigated thereby and described according to the townships and sections." Here follow the numbers of forty-six sections of land according to the legal subdivisions of the Government survey, and "all of which ditches, laterals, reservoirs, and lands as aforesaid are platted and laid out on the plan hereto attached and made part of this claim of lien."

The same descriptions of all the property sought to be charged in the notice of lien are given and averred in the bill of complaint and in the answer and cross complaint of appellants The Springer Land Association and the individuals composing it and admitted as correct. There is no denial either in the pleadings or in the proofs that the description is in any particular erroneous. The description of the ditches, laterals, reservoirs, and right of way is amply "sufficient for identification" and to enable any one familiar with that locality to go upon, survey, and plat the same with sufficient accuracy should it become necessary.

The twenty-two thousand acres of land sought to be charged is described by legal subdivisions according to the statutes and rules prescribed for the surveys of the public lands of the United States. There is no other way in which a description of lands can be given more satisfactorily than by the legal subdivisions of the public surveys. Such a statement must be held a specific description of the ditches, laterals, reservoirs, right of way, and of the lands, and a full compliance with all the essential requirements of the statute.

After a careful consideration of all the facts, claims, statements, and demands set out in the notice of claim of lien, averments
129 in the bill of complaint, and admit-ions in the answer thereto, it is found and so held that the notice of claim of lien is well founded and is in full and substantial compliance with all the essential requirements of the statutes on that subject, and that it has the force and effect to and does subject the said ditches, laterals, reservoir, and right of way and the real estate thereto pertaining as described therein to the demands of said appellee.

The most difficult proposition in the whole case is the effort on the part of the appellee to subject the twenty-two thousand acres of land not included as a part of the ditch system to the force and effect of his lien as a security for the satisfaction of his demands, in payment for his labor in constructing the ditch and reservoir system. This requires a most careful consideration of the further proposition, viz., how far a lien becomes effectual as to property beyond that upon which labor, materials, and skill have actually been expended in improvements and betterments upon a particular tract of land.

Appellants contend, with much force, that the lien cannot extend and attach under any possible construction to the twenty-two thousand acres, 1st, because the improvements were not put upon it; 2nd, because it belonged to the Maxwell Land Grant Company at the time the contract was made with Ford; and 3rd, because there is no averment in the notice of lien or in the bill of complaint that the land was necessary as and for "a convenient space about the same or so much as may be required for convenient use and occupation thereof," as provided by section 1522, *supra*.

These three propositions will be considered together, and the statute applicable to the first proposition is sec. 1529. Every building or other improvement mentioned in section 1520, constructed upon any lands with the knowledge of the owner or a person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of
130 this act, unless such owner or person having or claiming an interest therein shall within three days after he shall have obtained knowledge of the construction, alteration, or repairs or the intended construction, alterations, or repairs give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon said land or upon the building or other improvement situate thereon." So much of sec. 1520

as applies here is as follows: "Every contractor, subcontractor * * * or other person having charge * * * of any building or other improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this act."

This action is purely statutory, and the purpose in quoting *in extenso* from these sections is to give force and effect in so far as possible to the legislative intent in enacting the mechanics' lien laws and to arrive at the proper and just conclusions therefrom as applied to facts in the record.

The plat of the land refer-ed to in the notice of lien and in the pleadings as giving a description of the property sought to be charged is omitted from this record, and it is not clear from the record just what section of the land the line of the ditch passed over, but that it does traverse some of them is very clear. Though in the construction of a ditch the improve- may be limited to the land and the right of way, sixty feet in width and twenty-six miles in length, yet it is clearly apparent from the record that this ditch and reservoir enterprise was intended to and did improve and enhance the value of all the lands to be irrigated by it. In the contract made by the Maxwell Land Grant Company and the predecessors in interest of the Springer Land Association it is stated that "the party of the first part, with a view of selling at an enhanced value certain land amounting to about twenty-two thousand acres," the same lands here in question, for and in consideration of certain perpetual water rights and privileges, and for a certain part of the proceeds to be derived from the sale of the lands when sold, "agrees to and with the parties of the second part, that he, the representative of the Maxwell Company, will reserve, set apart, and hold from sale, except as hereinafter provided, said twenty-two thousand acres of land under the ditch system hereafter provided, and the parties of the second part agree to expend the sum of sixty thousand dollars or so much as might be necessary without delay to complete
131 the ditch system, as a consideration for the water rights, right of way, and for their share of the proceeds from the sale of the lands when sold."

Appellants The Springer Land Association and its associates in their cross-complaint set out this contract and made it a part thereof; averred that they had sustained damages in large sums on the ground of the alleged failure of Ford to comply with the terms of his contract to complete the same, in that they had at great expense secured purchasers for the land at good prices, but that by reason of appellee's lien having been filed the- could not complete the same, and that they had at great expense in the spring of 1890 established a "model farm" adjacent to and to be irrigated by said ditch system. It is clearly apparent from all the pleadings and proofs in the record that the only object in constructing the ditch and reservoir system was to improve and enhance the value of and render marketable the said twenty-two thousand acres of land. The appellants admit in their answer and aver in their cross-complaint the execution of the contract, and that the Springer Land Association was the successor in interest therein. The Maxwell Land Grant Company, its trustees and agents, had full notice of the

Ford contract and had ample knowledge that the same was being executed by Ford as the original contractor, and it is nowhere contended that it or its agents or trustees gave any notice that the company or its trustees would not be responsible for the work.

Appellants contend that the land can only be subjected to the lien by a showing that it is "required for the convenient use and occupation of the improvement," and then only "if at the commencement of the work * * * the land belonged to the person who caused said improvement or structure to be commenced," because there being no allegation in the bill of complaint that the said land was so required.

The claim of lien alleges that the land is appurtenant to the ditch "and under the ditch to be irrigated thereby and described by sections and townships," and the bill of complaint also alleges the same fact, and this is admitted by the answer. It was so "determined by the court below on rendering its judgment," and
132 the decree ordered the sale of so much of said twenty-two thousand acres of land as may be necessary to satisfy the demands of the appellee. All the proofs go to show that the land is appurtenant to and to be benefited by the ditch. This objection was raised for the first time in this court, and for that reason, if nothing else, is not well taken. The term "so much as may be required for the convenient use and occupation thereof" means all the land benefited and the value of which is increased or enhanced by the improvements actually made upon the land appurtenant and adjacent thereto and for which such improvements are made at the instance, knowledge, or consent of the owner or reputed owner thereof.

A ditch requires much more land for a convenient space, use, and occupation than a house, wall, or fence, and a lien will attach for the construction of either, and no one would contend that the space would be limited to the land actually occupied by either.

A lien may attach for the planting of a fruit orchard, and it could not be contended that only the space actually occupied by each tree would be subjected to the effects of the lien, but it would attach to the whole tract upon which the orchard was planted.

To hold that this lien attaches only to the ditch system, twenty-six miles long and sixty feet wide, would be in effect to render the security for the payment of appellee's demands practically valueless and to defeat the very spirit and intent of the law on which he had the right to rely for protection to secure payment for his labor. When the legislature enacted the mechanics' lien law it meant to provide security and to say to the laborer, either skilled or unskilled, and to the materialman that when he improves property with his skill, labor, or material that all the property so improved in value shall be held by him as security until his demands are paid in the manner provided by the statutes.

The following authorities are cited in support of this proposition:

Davis *vs.* Auxiliary Company, 9 S. C., 204.

Roby *vs.* University of Vermont, 36 Ver., 564.

Vandyne *vs.* Vanness, 1 Halstead N. J. Eq., 485.
133 Nelson *vs.* Campbell, 28 Pa. St., 156.

In Green *vs.* Chandler, 54 Cal., 626, it was held that all the lan was subjected to the lien, but there was no allegation in th complaint that it was necessary as a convenient space, and that th proof to that effect was not sufficient without such allegation sustain the judgment; but it is alleged in this case in the lien clai which is made a part of the bill of complaint and alleged therei and admitted in the answer that the land is appurtenant to th ditch. The court below found and determined on rendering the judg ment and decree that the twenty-two thousand acres were "require for convenient use and occupation thereof," and it is sustained b the proofs and is sufficient, and the lien does attach to and subjec the said twenty-two thousand acres to the effect thereof.

It is contended by the appellants that even if the lien does attac and become effectual as to this land it is excessive, because th forty-six sections described make twenty-nine thousand four hun dred and forty acres. This is on the theory that all the section were full; but there is no proof to sustain that conclusion. Appel lants admit in their answer "twenty-two thousand acres of land i said county and under said ditch, and to be irrigated thereby and described as follows." Then follows the sections by number, town ship, and ranges according to the Government surveys, and they are now estopped from setting up that these sections contain more than the quantity they admitted in their answer.

The description shows that about sixteen of these sections are bounded by the northern and western range lines, and U. S. Rev Stat., sec. 2395, provides that "where the exterior lines of the town ship which may be subdivided into sections or half sections exceed or do not exceed six miles the excess or deficiency shall be specially noted and added to or deducted from the western and northern ranges of sections or half sections in such townships, according as the error may be in running the lines from east to west or from north to south."

While the court is asked to presume that all the forty-six
134 sections contain the legal quantity, it may, in the absence of any other proof than appears here, with equal propriety pre sume that the discrepancy is accounted for by the deficiency in legal quantity by the statute and rules of Government surveying. Besides, quantity in the description of land is not the governing rule as against definite descriptions by metes and bounds or by name and number. In Jackson *vs.* Moore, 6 Cow., 706, the conveyance purported to include two tracts of land, being townships No. 3 in the 5th range and also No. 4 in the 6th range, to be six miles square, and containing twenty-three thousand and forty acres each and no more; but as these tracts were in fact six by eight miles in size, the court held that the whole passed. Sutherland, J., in delivering the opinion said: "It is perfectly settled that when a piece of land is conveyed by metes and bounds or any other certain description all included within those bounds or that description will pass, whether it be more or less than the quantity stated in the deed; and where the quantity is mentioned in addition to a description of the boundaries or other certain designation of the land, without an

express covenant that it contains that quantity, the whole is considered as mere description. The quantity, being the least certain part of the description, must yield to the boundaries or number if they do not agree." Stanley *vs.* Green, 12 Cal., 148. "While there may be a mistake respecting the courses and distances as to the boundaries of a tract of land or as to the quantity of acres or leagues it contains, there can be none when its extent is defined by permanent natural monuments." De Arguello *vs.* Greer, 26 Cal., 616; Wadhams *vs.* Swan, 109 Ill., 46; Ufford *vs.* Wilkins, 33 Ia., 110. "The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description. Neither party has a remedy against the other for the excess or deficiency unless the difference is so great as to afford a presumption of fraud." 2 Devlin on Deeds, sec. 1044. And where land is described by Government survey and by metes and bounds as containing a given number of acres the words as to quantity are held
135 merely as descriptive. Hatch *vs.* Garza, 22 Tex., 177; Belden *vs.* Seymour, 8 Conn., 18; Wright *vs.* Wright, 34 Ala., 194.

The general rule in such cases is that where quantity is given in a conveyance without an express covenant that the exact number of acres only shall pass, the quantity specified, being less certain, is merely descriptive — must yield to the description as to metes and bounds by permanent monuments and numbers according to the Government surveys, they being the more certain. Doe *vs.* Porter, 3 Ark., 57; Chandler *vs.* McCord, 38 Me., 564; Dale *vs.* Smith, 1 Del. Chan., 1; Jennings *vs.* Monk, 4 Metcalf (Ky.), 106.

But it is not quite clear just what standing the Maxwell Land Grant Company had in the court below or in this court, for the reason that the record here discloses the fact of the acceptance of service by its attorney and its appearance in the lower court by attorney, but it does not disclose any pleadings of any kind in its defense.

Appellants contend in their seventh assignment that the amount found for appellee in the court below is excessive, in that from the amount allowed should have been deducted eight thousand dollars on account of land agreed to be taken by appellee under his contract made between him and the Springer Land Association on October 25, 1888. Under the provisions of that contract Ford agreed to select one section of land of six hundred and forty acres under the ditch and to pay eight thousand dollars for it and to let that go as a credit and as a payment on his contract on the final estimate, and the Springer Association agreed to secure from the Maxwell Company a deed for the same free from all incumbrances and deliver it to Ford.

There is some proof as to the making of the deed by the Maxwell Company, but there is not sufficient evidence to establish such a tender of it to Ford by the Springer Land Association according to the terms and conditions of the contract as the law requires, and Ford was not bound in law to accept it and deduct that sum from his demands.

It is contended in the thirteenth assignment of errors that
136 before appellee can recover he should have satisfied and removed the liens filed by the subcontractors.

The record shows that the subcontractors did not file liens until the appellants refused to pay the original contractor on the final estimates, and the original contractor filed his lien first, as he had a right to do, for all the money due him, including the several amounts due the subcontractors, and that was the reason then given for the refusal of payment on the final estimates, and there was due Ford at that time, on the May estimate, over five thousand dollars, and over twelve thousand six hundred dollars on the final estimate.

There is nothing to show that Ford had not promptly paid his subcontractors out of the money received or that he was not responsible for the money due his subcontractors; on the contrary, he said he would settle with them as soon as he was paid, and this was before any liens were filed, and the filing of Ford's lien was brought about by reason of the failure of appellants The Springer Land Association to pay him according to the terms of the contract, and they should suffer for their own laches and not Ford. It could not be maintained that Ford should or could pay the subcontractors until he received his money for the work. To hold otherwise would be both unreasonable and unjust.

The sixth assignment is that it was error "in providing that the decree entered in said cause should operate as a personal judgment against each of the appellants The Springer Land Associates and its associates."

There are no authorities cited in the briefs of appellants or appellee in support of or against this proposition and we have no statute on the subject. In equitable proceedings a court of chancery will when it is possible afford a complete remedy, but it has been held in a States where there is no statute authorizing a deficiency judgment in foreclosure proceedings that it cannot be entered. Noon *vs.* Braty, 2 Black (U. S.), 499; Orchard *vs.* Hubes, 1 Wall., 73.

Our statute provides as follows:

"SEC. 522. The said supreme and district courts, in the exercise of chancery jurisdiction, arising under all causes and matters in equity, shall conform in their decisions, decrees and proceed-
137 ings to the laws and usages peculiar to such jurisdiction in this Territory, and the supreme, circuit and district courts of the United States."

By the rules of practice for the courts of equity of the United States it is provided as follows:

"92. Ordered that in suits in equity for the foreclosure of mortgages in the circuit courts of the United States or in any court of the Territories having jurisdiction of the same a decree may be rendered for the balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice when the decree is solely for the payment of money." This rule amended rule 8, which provided, among other things, that "final process to execute

any decree may, if the decree be solely for the payment of money, be by a writ of execution in the form used in the circuit courts in suits at common law in actions of assumpsit." U. S. Supreme Court Rules.

The bill of complaint contains a proper prayer in case of deficiency, and there was no error in the court below in entering a deficiency judgment and order for the writ of execution to issue in that event. Dodge *vs.* Freedman's Savings & Trust Co., 106 U. S., 445.

138 Appellants contend further that "the amount decreed is unauthorized by the facts" on the ground that the Springer Land Association was not bound to pay simply on the estimates found by the engineer for the reason that the amount certified by the engineer was to be "audited by the company" before payment and that the word- in specification 15 "meant to examine and adjust," and that this is a reserved power in the appellants, and that *it* had authority under that reservation to examine all statements and estimates made by the engineer before they were, under the terms of their contract and specifications, required to pay the amounts so certified, and that such estimates were not conclusive as against appellants.

To maintain this contention the Springer Land Association would have had to send a man to examine, measure, and compute the work reported on by the engineer at the close of each month before any payments could have been made.

It would require superhuman ingenuity to construe the contract and specifications to support this proposition; such a construction is excluded by the very words and terms of the specifications. It says, "On or about the first of each current month the engineer *with* measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten per centum retained, will be paid to the contractor in cash within ten days thereafter." The words "audited by the company," as here used, meant that the company would examine and compare each estimate and the vouchers with previous estimates, vouchers, and payments allowed and made by the company. The word "audit" is defined in the Century Dictionary as meaning "to make audit of, examine, and verify by reference to voucher; as an account or accounts; as to audit the account of a treasurer." Webster defines it to "compare the charges with the vouchers." There was nothing left for the company to do but to pay on the estimates furnished by the engineer or to refuse to do so and declare the contract void as to that condition. It refused to audit and pay the estimates, and it cannot now be heard to plead its own default.

139 Appellants contend that the court erred in its findings of facts and conclusions of law in that they were not sustained by the proofs.

As before stated, the cause was referred to a special examiner, who

took and reported the testimony to the chancellor, and he arrived at his conclusions on the facts and the law from the arguments and authorities cited by counsels and the facts contained in the record, and the whole record is here for review in just the same manner that it was before the chancellor, and it becomes the duty of this court to pass upon it without reference to the findings of fact and conclusions of law in the lower court. In this it is to be distinguished from the findings of facts by a special master appointed by the court by and with the consent of all parties in interest, and this court will pass upon the whole record and review, affirm, or reverse the decision of the court below where the reference was to an examiner only. The master who sees the witnesses, hears them testify, and observes their manner while upon the stand is supposed to be more competent to determine and pass upon their credibility and arrive at a correct conclusion as to the facts than a chancellor from mere reading of the testimony, and where the chancellor sits in the case and hears the witnesses testify orally his findings are in the nature of the verdict of a jury and will be so treated by the appellate tribunal and will not be reviewed unless it is appearant from the record that such findings of facts are not sustained by a preponderance of the evidence to the same material facts in the case.

There were a great many witnesses examined orally and a vast number of depositions taken and numerous exhibits offered on both sides, and it is impossible and impracticable in this opinion to review and rehe-rce the testimony found in the record. There are contradictions, criminations, and recriminations from almost the begin-ing to the close of the record, most of which were directed at and to the construction of reservoir No. 7, on the part of appellants, that it was not constructed in a substantial and work-
140 manlike manner and in accordance with the contract and specifications.

The appellee offered witnesses to prove that the dam and reservoir had been constructed in substantial compliance with the contract, and while there is some contradictions to his proofs by witnesses for the appellants it is not sufficient to overcome that of appellee's, and after a careful examination of all the evidence on this point it is found that the work was done in substantial compliance with the contract and specifications.

There seems to be little controversy as to the completion of the ditch, and the evidence shows that it was completed by Ford substantially as he agreed in his contract.

Efforts were made on the part of appellants to show that E. H. Kellogg, the supervising engineer, was during the greater part, if not all, — the time that the work was progressing under the influence of Ford, and that his estimates were incorrect and fraudulent, and that he was incompetent, and to establish this witnesses and expert engineers were put upon the stand to prove it.

One engineer was brought from Chicago, who spent some two months in "experting" the whole work for the Springer Land Association during the summer of 1889, and he reported as the result of his investigations descrepancies in the work, as is usually the case

in the testimony of expert witnesses. He was in the employ of appellants and did his work for them, and he was by no means a disinterested witness. As a general rule there is no testimony so unsatisfactory or so unreliable in the every-day affairs of life or that is so misleading or that results so disastrously to just and equitable conclusions in the homely affairs of business men as that of experts.

The proofs utterly fail to establish that Kellogg was either dishonest or incompetent or in any manner under the baneful
141 influence of Ford or any one else. Kellogg was the man mutually agreed upon to do the work by the Maxwell Land Grant Company and the Springer Land Association, and he was agreed upon by the Springer Land Association and Ford as supervising engineer and placed in charge of the work, and officers and agents of appellants were upon the ground and inspecting the work from its inception to its completion and had ample opportunity to investigate and report any misconduct on the part of Kellogg, but there were no objections made by any one to him until after difficulties arose between the parties. He was in constant communication with all the parties, and furnished them regular estimates from time to time as his duties required. The perusal of the record will disclose the vast amount of work done by him, and it is found that he did it apparantly with satisfaction to all conserned until after their difficulties came up and after the work was about completed. The proofs show that Kellogg had been engaged for a great many years in constructing irrigating plants in different parts of the country, and it also shows that he gave general satisfaction in other work of a similarr character in this Territory. Before a court will stamp a man as incompetant and a falsifier in his particular profession or line of buisiness, after sustaining a good reputation as such for more than twenty years, the proofs must be positive and convincing to the contrary. A character established for competency and honesty in a profession, occupation, or a particular line of business is a thing of value to any man, and it must not be brushed aside and held for naught on mere allegations and meaningless generalities.

— the view here taken of this case it becomes unnecessary to consider any of the other assignments of errors by appellants.

After a careful consideration of all the record it is found that weight of the evidence sustains the findings of facts by the court below, and the judgment and decree is affirmed, with directions to the lower court to make such order as will carry the same into effect.

N. B. LAUGHLIN, *A. J.*

We concur.

THOMAS SMITH, *C. J.*

N. C. COLLIER, *A. J.*

Justices Hamilton and Bantz did not sit in the case and took no*t* part in this opinion.

142 TERRITORY OF NEW MEXICO, }
County of Santa Fé. }

Supreme Court.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a full, true, and perfect transcript of such portions of the record is said cause as said appellants deem necessary for review in the Supreme Court of the United States as the same remains on file and of record in my office.

Seal Supreme Court, Territory of New Mexico.

Witness my hand and the seal of said court, at Santa Fé, New Mexico, this 18th day of November, A. D. 1895.

GEO. L. WYLLYS, *Clerk.*

143 In the Supreme Court of the United States.

PATRICK P. FORD, Complainant and Appellee,
vs.
THE SPRINGER LAND ASSOCIATION, CHRISTOPHER C. STRAWN, C. N. BARNS, MELVILLE W. MILLS, WILLIAM J. TEWKESBURY, FREDERICK J. EAMES, WILLIAM A. COMSTOCK; The Springer Land Association, a Corporation of the Territory of New Mexico; The Maxwell Land Grant Company, a Corporation; RUDOLPH V. MARTINSEN, CHARLES FAIRCHILD, NICHOLAS THOURON, SAMUEL L. PARRISH, MARTINUS P. PELS, HENRY M. PORTER, and FRANK SPRINGER, Trustees of the said Maxwell Land Grant Company, Acting under the Name, Style, and Title of the Board of Trustees of The Maxwell Land Grant Company, Defendants and Appellants.

Appeal from the Supreme Court of the Territory of New Mexico.

Now come said appellants, by their counsel, and say that in the record and proceedings of the supreme court of the Territory of New Mexico in the above-entitled cause there is manifest error in this, to wit:

1. That the said supreme court of New Mexico affirmed the decree of the district court for the fourth judicial district of New Mexico, sitting in and for the county of Colfax, in favor of said appellee, adjudging a lien upon the lands in said decree mentioned for the sum of $22,097.15 and ordering the said lands sold to satisfy the same, whereas upon the law and facts of said cause the said decree should have been reversed or modified.

Also in this, to wit, that the said supreme court, as by its opinion appears, held, decided, and adjudged as follows:

2. That the claim or notice of lien to foreclose which said action was brought was sufficient in law to create a lien upon the lands

described in the bill of complaint and decree of said district court also

3. That the land described in the bill of complaint and decree of the district court, outside of the ditches, reservoirs, and other improvements, and the land on which the same are situate, and
144 the right of way for the same, are subject to the said lien and were properly included in the decree of the district court foreclosing the same; also

4. That the defendant The Springer Land Association was not entitled to be credited, on the final estimate of the work done by complainant Ford, with the sum of $8,000 for and on account of six hundred and forty acres of land which was to have been taken in payment for said work to that amount under the agreement of October 25th, 1888; also

5. That there had been no sufficient tender of the deed for said land in assignment of error number four mentioned, and that complainant Ford was not bound in law to accept such deed and deduct the said sum from his demands; also

6. That the sum claimed in and by the notice of lien was due and the lien therefore valid, notwithstanding the existence of liens upon the same property for unpaid debts due his subcontractors by complainant Ford; also

7. That complainant Ford was not required to satisfy and remove the liens filed by his subcontractors upon the premises in question before the final estimate for complainant's work should become due and payable; also

8. That the amount claimed under said lien was due at the time such lien was filed, notwithstanding the estimates of the engineer therefor had not been audited by the company; also

9. That the mechanics' lien law of New Mexico, under which the lien in question was filed and sought to be foreclosed, is to be construed liberally.

Wherefore, and for divers other errors apparent on the face of said record, appellants pray that the said judgment of said supreme court of New Mexico may be reversed, annulled, and for naught held, and that said supreme court of New Mexico may be directed to
145 enter a judgment reversing the decree of said fourth judicial district court or modifying the same as equity may require.

Oct. 23, 1895.

FRANK SPRINGER,
Solicitor for Appellants.

146 [Endorsed:] No. —. Supreme Court of the United States. Patrick P. Ford *vs.* The Springer Land Association *et al.* Assignment of errors.

Endorsed on cover: Case No. 16,108. New Mexico Territory supreme court. Term No., 89. The Springer Land Association *et al.*, appellants, *vs.* Patrick P. Ford. Filed December 9, 1895.

No. 89.

Brief of Springer for Appts.

OCT 20 1897
JAMES H. McKENNEY,
CLE

Filed Oct. 20, 1897.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1897.

THE SPRINGER LAND ASSOCIATION, ET AL., *Appellants*, vs. PATRICK P. FORD, *Appellee.*	No. 89. *Appeal from the Supreme Court of the Territory of New Mexico.*

BRIEF FOR APPELLANTS.

FRANK SPRINGER,
Counsel for Appellants.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1897.

THE SPRINGER LAND ASSOCIATION, ET AL., *Appellants,* vs. PATRICK P. FORD, *Appellee.*	**No. 89.** *Appeal from the Supreme Court of the Territory of New Mexico.*

BRIEF FOR APPELLANTS.

Statement.

This is an action in chancery, brought by Patrick P. Ford, appellee, against The Springer Land Association and certain other defendants, to foreclose a mechanics' lien upon an irrigating

ditch and reservoir system, the land covered thereby, the right of way therefor, and the lands intended to be irrigated thereby. It is founded upon the following facts, which are taken from the statement of facts certified by the lower court.

On October 26, 1888, a contract was entered into between Patrick P. Ford of the one part, and The Spinger Land Association of the other, for the grading work in the construction of a certain ditch line and reservoir system for irrigation, in Colfax county, New Mexico. (Rec. p. 77.) The provisions of this contract and the specifications made a part of it, so far as pertinent to this case, were as follows:

"The party of the first part to furnish all necessary tools and labor, and perform all work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made part of this contract. * * * The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. Amounts due for said work shall be paid at the time, and in the manner, described in the specifications hereto attached:

"Specification 13:—Subcontracts must be submitted to the engineer and receive his approval before work is begun under them. No second subcontractors will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer.

"Specification 15:—On or about the first day of each current month the engineer will measure and compute the quantity of the material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary

delay, and the amount thereof, less ten per centum retained, will be paid to the contractor in cash, within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate, upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfill his obligations will mean a forfeit of this retained percentage to the company. The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that work is free from all danger from liens or claims of any kind, through failure, on his part, to liquidate his just indebtedness as connected with this work."

Previous to the making of the last mentioned contract, and on May 1, 1888, The Maxwell Land Grant Company made a contract with one C. C. Strawn and associates—who afterwards organized The Springer Land Association, which succeeded to their rights and obligations—by which The Maxwell Land Grant Company gave to them the right of way for the proposed irrigation system of ditches and reservoirs, and by which agreement it was among other things provided, that with a view to selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises to be granted to it by the other party, the Maxwell Company agreed to set apart and reserve from sale 22,000 acres of its lands to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold; these lands were under the proposed ditch system and to be irrigated by it; Strawn and his associates were to expend about $60,000 or a sufficient sum to complete the

enterprise on the proposed plan. (Rec. p. 81.) The title to the lands covered by and to be irrigated by said ditch and reservoir system was at that time and at all times afterward to remain in The Maxwell Land Grant Company, except as to the rights acquired by Strawn and his associates and their successors in interest under said contract. Strawn and his associates and successors were constituted the agents of the Maxwell Company to the extent of and for the purpose of carrying into effect the contract as to the sale of the said lands, but had no other title in the lands than as given by said contract. (Rec. p. 91.)

Five days subsequent to the making of his grading contract, complainant Ford entered into another contract with The Springer Land Association, by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of $8,000, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch. (Rec. p. 91.)

The contract of May 1, 1888, designated one E. H. Kellogg, as the engineer to have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Land Association of October 20, 1888; but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer. (Rec. p. 91.)

Ford let subcontracts for portions of the work to McGarvey, Dargel and Haynes. His contract with Dargel is found on page 91 of the record. The contracts with McGarvey and Haynes were of like

form and tenor, and all were approved by said E. H. Kellogg. Estimates as provided by the contract of October 20, 1888, were made by said Kellogg, supervising engineer, from time to time, which were audited and paid by the Land Association up to about May, 1889. Estimate number 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving 10 per cent, to be $5,010.92; the amount of this estimate has never been paid. On June 13, 1889, the said engineer gave to Ford a written acceptance of the work, and a final estimate for $12,625.53 in addition to the amounts of the sixth estimate. (Rec. pp. 92-3.)

The total amount stated to be due Ford by said engineer's estimates at the date of the acceptance of the work by the engineer was $17,636.45. This amount the Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to contract; that the engineer's final estimate was erroneous, either through fraud, inadvertence or mistake; that the subcontractors had not been paid the several sums due them on the work by Ford, and the property was not free from danger of liens; and also that Ford should accept the section of land which he had agreed to accept, and which he had previously selected, in payment of $8,000 of the amount of such final estimate. (Rec. p. 93.)

The Land Association procured to be made and properly executed a deed of conveyance by The Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by the said Ford, and had the said deed present in the hands of an agent

of the said Maxwell Company on June 19, 1889, when the representative of the Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon the payment to the agent of the Maxwell Company by the Land Association of $4,000. The representative of the Land Association had with him at the time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4,000 to the agent of the Maxwell Company for the deed, if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4,000, which Ford disputed as to $300 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and reservoir for the amount of his claim. The agent of the Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The disagreement between Ford and subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. (Rec. pp. 93-4.) The amounts claimed by the several subcontractors at the time were as follows:

McGarvey - - -	$4,308.72
Dargel - - - -	2,279.00
Haynes - - - -	800.00
Land - - - -	150.00
Total - -	$7,537.72

(Rec. p. 94.)

On July 3, 1889, complainant Ford filed notice of claim of lien for $17,634.27, alleged to be due on the contract, and $390 for extra work. (Rec. pp. 94-5.) To said notice was attached a copy of the contract of October 20, 1888, and the specifications.

On July 25, 1889, subcontractor McGarvey filed notice of lien upon the same property mentioned in Ford's claim of lien for $5,000, alleged to be due him from Ford upon said work. On August 1, 1889, subcontractor Dargel filed his notice of lien on the same property for $2,279.30. (Rec. p. 96.)

All of said notices of lien were filed in the office and within the time prescribed by law. Suits were commenced to foreclose these liens as follows:

By Dargel, February 28, 1890; by Ford, June 30, 1890; by McGarvey, July 22, 1890. All of said suits were begun within the time limited by law, and Dargel's suit was still pending at the date of the decree in this case (Rec. p. 96); this fact is recited in the decree itself. (Rec. p. 68.)

The bill filed by Ford June 30, 1890, sought to foreclose his lien for the full amount claimed by him, being $18,024.27 (including the final estimate and $390 not mentioned in the final estimate), not only upon the ditch, reservoirs and right of way therefor, but also upon 22,000 acres of land, described as

forty-six specific sections, which was outside of the ditches, reservoirs and right of way, but was alleged to be appurtenant to said ditches and reservoirs and to be irrigated thereby.

The Springer Land Association and the individuals composing it answered the bill, denying liability on substantially the same grounds as above stated for refusing to audit and pay the estimates.

Defendants also filed a cross-bill setting up substantially the same matters averred in the answer. Complainant filed a general replication to the answer and answered the cross-bill; and on the issues thus formed a vast amount of testimony was taken, the bulk of which was directed to the completion or non-completion of the work and the *bona fides* of the final estimates made by the engineer.

The District court found the law and facts for the complainant, and rendered a decree in his favor for $22,097.75 debt,—being the full amount of his claim with interest,—with costs, and $1,000 attorneys' fees, establishing a lien for that sum upon the ditch, reservoirs, right of way, and 22,000 acres of outside land, and ordering foreclosure and sale of the whole to satisfy the lien. From this decree defendants appealed to the Supreme court of the Territory of New Mexico, by which it was affirmed; and upon appeal from the judgment of the territorial court affirming the decree the case is now in this court for review. Appellants have assigned errors in due form. (Rec. pp. 116-117.)

Those upon which we rely for a reversal of the judgment below are:

That the Supreme court of New Mexico, instead of affirming the decree of the District court, should have reversed the same for the reasons:

1. That the claim or notice of lien to foreclose which this suit was brought was insufficient in law to create a lien.

2. That the amount claimed and adjudged as a lien was excessive, and included claims not due or payable.

3. That the final estimate was not payable by reason of the existence of liens of subcontractors.

4. That defendant should be entitled to be credited with the sum of $8,000 on the final estimate, on account of land which was to have been taken in payment thereon.

5. That no lien attached to the land outside of the ditches, reservoirs and the right of way for the same.

The Supreme court of New Mexico has made and certified as a part of the record, a statement of the facts of the case, and upon the facts so found alone the questions herein discussed are presented for review. (Rec. pp. 77-97.)

Act of Congress, April 7, 1874, chap. 80 (18 Stats. at Large, p. 27).

San Pedro Company vs. United States, 146 U. S. 130.

Argument.

The relief sought in this case is based upon the mechanics' lien law of New Mexico; and the portions of it applicable to the case are found in the following sections of the Compiled Laws of 1884:

"SEC. 1520: Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct, to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purpose of this act."

"SEC. 1522: The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

"SEC. 1524: Every original contractor, within ninety days after the completion of his contract, and

every person save the original contractor, claiming the benefit of this act, must, within sixty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."

"SEC. 1526: The recorder must record the claim in a book, kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed; and for which he may receive the same fees as are allowed by law for recording deeds and other instruments."

"SEC. 1529: Every building or other improvement mentioned in section 1520, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act; unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon."

"SEC. 1530: The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of subcontractors under him who have filed liens for work done and materials furnished, as aforesaid, and in all cases where a lien shall be filed, under this act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action, the owner may withhold from the contractor the amount of money for which lien is filed, and in case of judgment against the owner, or his property, upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due, by him to the contractor the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

Not only is this action a statutory proceeding pure and simple, but the lien sought to be foreclosed is a mere creature of the statute. The lien is the foundation of the action; without it there can be no foreclosure, because there is nothing to foreclose. The lien can be brought into existence only by taking the steps prescribed by the statute, which are conditions precedent to its establishment. Inasmuch as the lien is created by a summary proceeding, *ex parte*, in hostility to the owner, by which his title is to be clouded and his property encumbered without any act or concurrence of his, the tendency of the courts has been to exact a strict and substantial compliance by the intending lienor with the statutory

requirements before initiating and perfecting the lien: failing which he is left to his ordinary remedy at law against the debtor.

In Phillips on Mechanics' Liens, sec. 1, it is said:

"The lien of mechanics and material-men on buildings, and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the creation of the statute, and was unknown either at common law or in equity."

The same author, treating of the construction of these laws, says, at section 18:

"As the laws call for nothing unreasonable at the hand of him who would fasten an encumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions (citing *Noll vs. Swinesford*, 6 Pa. St. 187); so an act authorizing property to be encumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used (citing *Mushoitt vs. Silverman*, 50 N. Y. 360). Statutory provisions permitting the summary enforcement of private charges, such as mechanics' liens, on property, without the consent of the owner or judicial sanction, cannot be extended in their operation beyond the plain and fair sense of the terms in which they are expressed. A title, therefore, under the mechanics' lien law is purely statutory, and its validity depends on an affirmative showing that every essential statutory step in the creation, continuance or enforcement of the lien has been duly taken."

Id., sec. 18.

See also—

Jones on Liens, secs. 112 and 1544, 1545.

Canal Co. vs. Gordon, 6 Wall. 571.
Bottomy vs. Grace Church, 2 Calif. 90.
Wagar vs. Briscoe, 38 Mich. 587.
15 Am. & Eng. Ency. of Law, p. 5.

In *Wagar vs. Briscoe*, *supra*, speaking of mechanics' lien laws, the court said:

"In perfect agreement with the views generally maintained in the tribunals of our sister states, this court has repeatedly declared in substance that these acts are innovations upon the common law over the rights of property, by permitting the institution of private charges on property without or against the owner's assent, and without any judicial or other official sanction, and by authorizing an enforcement of such charges by unusual and summary methods, and that the provisions of these enactments cannot be extended in their operation and effect beyond the plain and fair sense of the terms; and that parties asserting liens or titles resting upon them must bring themselves and their titles plainly and distinctly within these terms and affirmatively make out that a lien was originally effected regularly and thereafter kept up, and that every essential statutory step, either in the creation, continuance or enforcement of the lien, has been duly taken. We have seen nothing to shake these opinions."

Such was emphatically declared to be the law by the Supreme court of New Mexico in *Finane vs. The Las Vegas Hotel Company*, 3 N. M. 258, and affirmed in *Minor vs. Marshall*, 27 Pac. Rep. 481.

The opinion in the case at bar, although professing to overrule *Finane vs. The Las Vegas Hotel Company*, does not really modify the principles before declared to govern the enforcement of the mechanics' lien law, though we believe its application of them to be erroneous. It equally requires a distinct and

certain compliance with all the substantial statutory requirements before the lien can attach. A "liberal construction" of such a law, which the court enjoins, means nothing more than that the object of the law shall not be defeated by unreasonable technicalities. It does not mean that courts will make new contracts for parties, or assist in fixing an *ex parte* lien upon property where the language employed would have been insufficient if concurred in by both parties; or enforce a summary security for the collection of a claim for which an action could not have been maintained at common law.

The appellants contend that the lien as claimed never attached to the property sought to be encumbered, and that by reason of the insufficient and erroneous character of the claim as filed any right to a lien that Ford might have had was lost.

I.

There Was No Sufficient or Correct Statement of Contractor's Demand.

The law (sec. 1524, *supra*) requires the contractor to file for record "a claim containing a statement of his demands." This necessarily means an account by which the elements of the claim shall be stated with such reasonable particularity as will enable the owner to intelligently determine the *bona fides* of the claim, as well as its precise nature. The statement filed in this case is for "balance due * * * by the owners or reputed owners" (who are elsewhere in the claim said to be The Maxwell Land Grant Company and certain individual trustees), "* * * under contract with The Springer Land Association * * * for excavating and

embankments done and performed" by Ford; and also a "further sum * * * for extra excavating and embankments ordered and allowed by the engineer in charge." (Rec. p. 95.)

The contract under which the work was alleged to be done is attached to the claim, and it shows that nothing could have been due by the owners of the property for any work done under it. There is nothing in the claim or the contract attached to it to show how the land of the owners (Maxwell Land Grant Company, *et al.*) can be encumbered for work done under a contract with an entirely distinct party. When the work is not done for the owner of the property, the relation which the person for whom it is done occupies to such owner must be so stated as to bring him within the list of those who under the lien law are authorized to bind such owner; otherwise the lien is void.

Warren vs. Quade, 3 Wash. St. 780.
Tacoma Lumber Co. vs. Wilson, *Id.* 786.

These cases were decided upon a statute identical with that of New Mexico.

Allegations in the bill by which it is sought to supply this defect cannot cure the insufficiency of the claim of lien. *Warren vs. Quade*, *supra*. At all events the statement of demand is directly contrary to the fact as found by the court below, and hence the claim of lien is:

a. Erroneous as to the party from whom due.

It is also:

b. Insufficient, because it contains no statement of the amount of work done; nor of the payments made; nor the estimate or acceptance by the engineer

which might perhaps take the place of such a statement.

It shows neither by direct assertion nor by any estimate, what was done, or what had been earned, under the contract. The mere mention of a lump sum as a balance due has been held by a number of authorities to be an insufficient compliance with the statute requiring a statement or account to be filed.

In *Noll vs. Swineford*, 6 Pa. 187, the claim was for "$579.65 * * * for carpenter work done and performed in and about the erection of said building, as a carpenter, and for material; to-wit: lumber furnished by said Noll, between the ninth day of June and the twenty-third day of February."

This was held to be an insufficient statement.

"Where the law calls for a just and true account, it means a fairly itemized account, showing what the materials are, the work that was done, and the price charged. A lumping item of the whole contract price on one hand, and the credits on the other, is no compliance with the law. The account should be complete on its face, and a reference to plans and specifications is worthless, and adds nothing to the statement. These liens are creatures of the statute, and the lienor must make and file an account which is a fair and substantial compliance with the law. If he fails to do this he has no lien for the labor and material and work not thus specified. It is urged that this is a case between the contractor and the owner of the property, and that there is no need of the same particularity as where a subcontractor seeks to enforce a lien. The answer is that the statute is the same in both cases, and makes no such distinction."

Rude vs. Mitchell, 97 Mo. 366.

In all mechanics' lien cases the account filed must be so itemized as to enable issue to be taken

on each item, and this whether the owner have knowledge as to the correctness of the account or not.

Heinrich vs. Carondelet, etc., 8 Mo. App. 588.

An account in gross for the entire contract price is not sufficient.

Brims vs. Capstick, 46 Mo. App. 39.

In *Shackleford vs. Beck*, 80 Va. 573, the claim as filed was: "To balance of account rendered for work and labor done and material for your house." This was held insufficient to create a lien. It having been urged that the defendants had received notice of the items making up the amount, the court said:

"But suppose in fact they did have notice, would that have cured the error or failure of appellant to file an account or statement according to the terms of the statute? Suppose he had actually shown the items of his account to Chandler and not filed it in the clerk's office at all; could he thereby assert a lien upon the property? The only question is, did the appellant proceed according to law so as to acquire a lien upon the property?"

In *Valentine vs. Rawson*, 57 Iowa, 179, the claim for lien set out the contract to build, and described the land; stated that by virtue of said contract claimant had furnished materials for said building as specified; and that two notes amounting to $183 had been given him, at and for the usual price charged for such labor and material; that the account is just and true after allowing all credits and offsets, etc. The court held that the paper failed to comply with the law, "in that it does not show when the lumber was furnished, and does not contain a

statement or account of the demand due plaintiff. The simple statement that a sum is due plaintiff for which notes were given, is not the statement or account required by the statute."

In *Wagner vs. Hansen*, 103 Calif. 104, in holding the statement in a mechanics' lien claim to be insufficient, the court said:

"Such a notice and claim of lien does not contain a true statement of the terms of the contract, as required by section 1187 of the Code of Civil Procedure. There was no other statement as to the nature of plaintiff's demand in the claim of lien. There was no account of services rendered. The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true. See, on this point, Frazer vs. Barlow, 63 Cal. 71; Malone vs. Mining Co., 76 Cal. 578, 18 Pac. 772; Eaton vs. Malatesta, 92 Cal. 75, 28 Pac. 54. Respondent's only reply to this objection is that it is a mere technicality. Plaintiff's claim to a lien is a mere technicality. He is given a right upon condition that he complies with the statute, and there must be a substantial compliance with all these conditions to the right. Wood vs. Wrede, 46 Cal. 637."

It is therefore clear that a mere claim without a statement does not meet the requirements of the statute. The law contemplates such a statement as will enable the parties to take issue upon its correctness. Statutes which require a true account of the work done or material furnished imply an itemized or detailed statement of the transactions which are

the foundation of the lien. *2 Jones on Liens*, sec. 1417. In the case at bar it should be the more required, because there was no contract between the owner and Ford. His contract with the Land Association was not for a lump sum, but for a specified price per cubic yard for the work done by him. Payments had been made, of which no mention is made in the claim. It is a case where a statement of details and items was not only possible, but natural and proper. There was nothing difficult or unreasonable in a strict compliance with the law.

II.

The Amount Claimed in the Lien was Excessive Because no Cause of Action Existed Upon the Final Estimate.

The law requiring a "statement of his demands after allowing all just credits and offsets," implies that such statement shall be true. If by reason of facts disclosed upon the trial it appears that the amount of money claimed was, in fact, not then due or payable, in whole or in part, the lien is necessarily defeated, if not entirely, at least *pro tanto*. It does not require argument to prove that if Ford had no right of action upon his contract, he could not obtain a mechanics' lien based on it. If he could not recover in an action at law, he could neither create a lien by filing nor enforce it by suit. If by the terms of the contract between the parties the claim was not legally demandable, no lien could be founded upon it.

"It is familiar law that there can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable."

Harmon vs. Ashmead, 60 Calif. 441, and cases cited.

"It must show not only that the debt is owing, but that it had become payable before the commencement of the action, so that there was at that time a cause of action."

Jones on Liens, sec. 1588.

Such we claim to be the case here for two reasons:

1. The final estimate of $13,625.53 was not yet payable.

The contract (specification 15, Rec. p. 80) contains the following provision:

"The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work."

Such a showing is a condition precedent to the right to recover the amount of the final estimate. Ford could not legally demand its payment nor obtain judgment for the amount, without proof of this fact. *A fortiori* must he fail in any action therefor if it be shown by the defendant that when the suit was brought not only was there danger of such liens, but they actually existed in full force as encumbrances on the property. By Section 1524 of the Mechanics' Lien Law, *supra*, the subcontractors had sixty days from the completion of the work in which to file their liens. If, therefore, upon the completion of the work and the making of the final estimate, anything was due and unpaid to a subcontractor, the work could not be said to be free

from danger of liens until the expiration of sixty days, which would be the thirteenth of August, forty days after Ford's lien was filed; unless in the meantime the subcontractors were fully paid off.

It appears by the statement of facts made by the lower court (Rec. p. 93) that the parties met for settlement on June 19, 1889; that the representative of the Land Association had with him ample funds for the purpose of making a final settlement; that the subcontractors were there demanding payment; that Ford disputed the account of the largest one, and refused to pay him unless he would accept a less amount and give Ford a receipt in full; that the subcontractor refused to do this, and claimed that he had a lien on the ditch and reservoir for the amount of his account; that the agent of the Land Association then offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them, but that no settlement was made between Ford and McGarvey; that the amounts claimed by the several subcontractors at the time aggregated $7,537.72; that subsequently, and within the time prescribed by law, the two largest subcontractors filed claims of lien on the property for $5,000 and $2,279.50 respectively, brought suits thereon in due time, one of which was still pending at the date of the decree in the District court in this case. (Rec. pp. 68 and 96.) Hence not only was the property not free from danger of liens when Ford's lien was filed, but when he brought this suit liens actually existed, claims therefor had been filed on the property to the amount of $7,279.50, and suit was already brought to foreclose one of them.

So long as this state of facts remained it must be clear that no recovery could be had for the amount

due upon the final estimate in any form of action. Such provisions as that in specification 15 are very common, probably now universal, in building contracts. Their object is to protect the owner from having to pay twice for the same work. They are reasonable and necessary, of great importance to the owner, and of no hardship to the contractor. They have been held by the courts to be absolutely binding, and failure to observe them fatal to the contractor's right of action.

Phillips, in his work on Mechanics' Liens, says:

"A substantial performance, according to the terms and conditions agreed upon, is a condition precedent to the builder's right to maintain an action under the mechanics' lien law." (Sec. 134.)

"The rule is well established that where a party by his own contract creates a duty or charge upon himself, not absolutely impossible, his undertaking must be substantially complied with under any and all circumstances." (*Ib.* sec. 135.)

"So if a contract stipulates that no payment is to be considered as due if at the time there are any liens on the building in consequence of the acts of the contractor, the latter will be held to the performance of this stipulation and there can be no lien as long as he is in default." (*Ib.* sec. 136.)

In Holmes vs. Richet, 56 Calif. 307, 316, the contract provided:

"That for each of said payments a certificate shall be obtained from and be signed by the architect; and also, that the time of the presentation of either of the said certificates there be neither opposition against the said payments, nor any liens against the aforesaid building."

The District court found that before the last installment became due a lien was filed upon the

building, and therefore such installment was not due and payable according to the terms of the contract. As that court also decreed that the amount of this lien should be deducted from the amount due the contractor at the time the suit was brought, it was claimed that the order of the court deducting the amount of this lien from the amount due the contractor operated as a payment and discharge of said lien, and therefore the last installment was due and payable. Upon this proposition the Supreme court of California said:

"It is a sufficient answer to the argument made in support of this proposition that the parties have expressly contracted that if any lien upon the property shall exist at the time when an installment would be otherwise due and payable, the existence of such lien shall constitute a good and sufficient reason for the nonpayment thereof. This we understand to be the effect and meaning of the agreement, and it is simply the duty of the court to enforce contracts as the parties have made them."

It is held in the opinion of the court below that Ford was excused from performance of this stipulation because defendant had not paid him the amounts due on the 6th estimate, or the final estimate. It states that—"there is nothing to show that Ford had not promptly paid his subcontractors out of the money received, or that he was not responsible for the money due his subcontractors. It could not be maintained that Ford should or could pay the subcontractors until he received his money for the work." (Rec. p. 112.)

The answer to this is that the parties expressly contracted otherwise. The final estimate was not to be payable until the property was shown to be free

from danger of liens; and Ford could have shown this either by payment of the subcontractors, or by obtaining from them a release of all claim of lien, or still more simply by giving them orders on the Land Association for the amounts due them, payment of which would operate as a discharge of their liens and payment to Ford at the same time. This was in fact practically proposed by defendant and refused by Ford.

It has been claimed in argument that the non-payment of the 6th estimate relieved Ford of the consequences of the stipulation in specification 15, because the danger from liens did not exist "through failure on his part to liquidate his just indebtedness," but through defendants' failure to pay him. This proposition cannot avail in this case, for two complete reasons:

1. The amount of the 6th estimate was not sufficient to pay the subcontractors,—being only $5,010.92; whereas their claims amounted to $7,537.72.

2. The defendant, before the filing of any liens, offered to pay off all the subcontractors directly if Ford would adjust the amounts due them, which he unreasonably refused to do.

It has also been claimed that because Kellogg, the engineer in charge, approved the contracts of Ford with the subcontractors, in which it was provided that their pay should not be due them until Ford should receive his from the Land Association, the provision in specification 15 was thereby abrogated. But nowhere can there be found any authority in Kellogg to make new contracts for the Land Association, or to modify those it had already made. His position, as stated in the findings of fact by the

lower court, was that of supervising engineer, with the assent of all parties, no engineer being named in the contract between Ford and the Land Association. (Rec. p. 91.) His agency was a limited one —to supervise the carrying out of the contract made by the principals. It is inconceivable that in a mere provision requiring him to approve the subcontracts there should be found by implication authority to rescind, in whole or in part, the very contract whose execution he was designated to supervise. Such provisions are common, and their object is to enable the engineer to see that nothing prejudicial to the completion of the work according to the plans is agreed upon with subcontractors, and to ensure the control which he is to have over them as well as the contractor.

2. A credit of $8,000 for payment in land should have been made on the final estimate.

As is set forth in the statement of facts, five days after the making of the grading contract, Ford entered into another contract with The Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of $8,000, "to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch." (Rec. p. 91.) It further appears as facts found by the court below that the Land Association procured to be made and properly executed a deed of conveyance by the Maxwell Company, which held the title, to Ford, for the section of land which had been selected by Ford; and had the deed present in the hands of an agent of the Maxwell Company at the meeting on June 19,

1889, to be delivered to Ford upon payment to such agent by the Land Association of $4,000; that the representative of the Land Association had with him at that time sufficient funds to pay said sum, and notified said agent and Ford that he was ready to pay the $4,000 for the deed, if Ford would settle with his subcontractors; that Ford examined the deed and made no objection to it; that the disagreement between Ford and subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. (Rec. pp. 93, 94.) The statement further says that the representative of the Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him to accept it.

The last statement of the court below as to a tender of the deed is that of a conclusion of law rather than a fact. It does not affect this question, in view of the facts previously stated, which show conclusively that no tender was necessary. The deed was there ready to be delivered to Ford on payment of the $4,000 to the holder of the title; the money was there to pay it; and payment was offered upon the one condition that Ford should settle with his subcontractors, for which purpose also payment was offered if he would adjust the amounts. This condition was proper and fully warranted by the contract. The Land Association was not bound to make an unconditional tender or delivery of the deed in payment of the $8,000 on the final estimate, so long as there were unpaid claims of subcontractors which might become liens on the property. Until these were settled the land was not due, and the Association could not, with safety to itself, deliver the deed,

any more than it could safely pay the balance of the final estimate in money.

This is one of the cases where the rule of law requiring an unconditional tender as a condition precedent to establishment of any right under the contract, does not apply. The suit is in equity, and in addition to the observance of the statutory requirements necessary to enable him to create and enforce a lien, complainant is bound by the rules and maxims of equity jurisprudence;—among others that he who seeks equity must do equity, and that equity does not require an unreasonable or unnecessary thing. The principle governing actions for specific performance of contracts is manifestly applicable here. This is stated by Pomeroy—3 Equity Jurisp., sec. 1407—as follows:

"The doctrine is fundamental that either of the parties, seeking a specific performance against the other, must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit."

In the note to that section on page 453, he says:

"In general the rules of equity concerning the necessity of an *actual* tender are not so stringent as those of the law. * * * An actual tender by the plaintiff is unnecessary when, from the acts of the defendant, or from the situation of the property, it would be wholly nugatory."

Further on in the same note (p. 454), in discussing a conflict of the American decisions, he states as the rule more in accordance with the principles of equity:

"That in such contracts an actual tender or demand by plaintiff prior to the suit is not necessary. It is enough that he was ready and willing, and offered at the time specified * * *. The plaintiff's performance will be provided for in the decree."

And he adds: "This is unquestionably the true equitable doctrine."

The subject is discussed more at length in Waterman on Specific Performance, from which the following extracts are made:

"With regard more particularly to what constitutes an offer to perform, it is sufficient, in general, that a party has made a *bona fide*, reasonable and earnest effort to fulfill; and the court will disregard technical objections on the other side which have the appearance of an attempt to get rid of the contract." (Sec. 439.)

"When the purchaser is to pay, and the vendor upon payment to convey, performance, or an offer to perform, is a condition precedent to the right to insist upon performance by the other party." (Sec. 443.)

"Although when a strict tender is required, it must be an unconditional offer of the full amount due, leaving it only at the will of the other to accept it, yet when one is to pay money and the other to give a conveyance, no time fixed and no provision that either shall be done first, the covenants being mutual and dependant, one is not bound to pay without receiving his conveyance, nor the other to part with his land without receiving his money. In such case it is not necessary, on the part of the purchaser, to make a strict tender, and actually to deliver over the money unconditionally without his deed. It is sufficient that upon reasonable notice to the owner, he is ready and willing to perform, and when performance is the payment of money, that he has the money and is able and prepared to pay, and demands

the deed, and the other refuses to receive the money and execute the deed." (Sec. 444.)

"When the facts alleged in the bill, or given in evidence, show that an offer of performance by the plaintiff would not have been accepted, such offer is thereby rendered unnecessary. * * * The mere neglect of the vendor to tender to the vendee a deed, when the vendee is not injured by the delay, is not sufficient to preclude him from maintaining a suit to compel the vendee to receive the title." (Sec. 446.)

The distinction as to the rule of tender between law and equity, and the reason for it as well, are nowhere more concisely stated than by the Supreme court of Iowa in *Winton vs. Sherman*, 20 Iowa, 296, as follows:

"In an action at law to recover the consideration agreed to be paid for real estate not yet conveyed, but which, by the contract of purchase, was to be conveyed at the time of payment of the consideration, it has been held a sufficient defense to aver and show that the deed had not been delivered or tendered. But this rule does not obtain in equity cases, where the court upon final decree can grant just such relief as the plaintiff can show himself entitled to, upon such conditions as shall fully protect the right of the defendant, not only as to the subject matter, but as to costs. A delivery or tender of a deed, before bringing suit in equity for the purchase money and foreclosure of a lien therefor, or other equitable relief, is not necessary. See *Rutherford vs. Harris*, 11 Iowa, 587, and cases cited."

In the last cited case, the court said:

"In our opinion, the reason for the rule in a law action does not apply in a court of equity. At law if the vendor recovers his judgment for the purchase money, it must necessarily, from the nature of

the tribunal, be unconditional and without terms. In equity the chancellor has full power to protect the vendee, and to make the execution and deposit of the deed with the clerk, or other person to be named, a condition precedent to the enforcement of the decree."

The ruling on the question of this land payment illustrates most forcibly the erroneous theory upon which the lower court administers the mechanics' lien law in an equitable action. In order to preserve to Ford a lien for the amount of the final estimate, it ignores an express provision of the contract by which it was not yet payable, on the ground that "to hold otherwise would be both unreasonable and unjust." (Opinion, Rec. p. 112.) And in order to give him additional security, it extends the lien to large areas of land outside of that covered by the improvements, without any finding such as the law expressly requires to authorize it, because to do otherwise would "defeat the spirit and intent of the law." (Rec. p. 109.) But when defendant seeks to avail itself of an express contract right to make part payment in land, the court defeats him by invoking one of the strictest of common law rules, without the least reference to what would be "reasonable and just," or other equitable considerations.

3. The decree is clearly erroneous as to the $390 claimed in the lien for extra work.

It is not included in the final or any other estimate, and there is not the slightest evidence in the record that it was allowed by the engineer, or was due for any reason. On the contrary, the fact is distinctly stated in the findings by the lower court (Rec. p. 93), that "the total amount due Ford by the engineer's estimates at the date of the acceptance of the

work was $17,636.45"; whereas the judgment is for $18,069.20, with interest at six per cent per annum, on $6,010.82 of it from May 10, 1889, and upon the residue from June 13, 1889, (Conclusion of Law III. Rec. p. 65) which makes the total of $22,097.75, "being the amount mentioned in his notice of lien with interest," etc., adjudged as a lien by the decree. (Rec. p. 65.)

An innocent overstatement of the amount of the claim will not invalidate a mechanics' lien, but it requires a liberal construction to find this one free from misstatement, which a more careful regard for contract rights and facts might have avoided. It seems to us perfectly established that the claim of lien was erroneous to the entire amount of the final estimate of $12,625.53, and the $390 for extra work —making $13,015.53—which should be deducted from the amount adjudged by the decree, as of date June 13, 1889, the date from which interest was computed and allowed on it. (Rec. p. 65.)

But if by any means this proposition can be overcome, the decree of foreclosure is still erroneous in failing to give the defendant the right to pay the sum of $8,000 in land, to be credited as of June 19, 1889—the date when it was ready and willing and offered to do so—upon its delivering to complainant, within a reasonable time, a deed for the land.

If it be asked why the defendant has never paid anything on the last two estimates, the answer is that the record shows that there has never been a time to this day when the property was free from the lien of a subcontractor. And besides, it appears in the findings below that upon the failure of Ford to settle with his subcontractors at the meeting on June

19, 1889, one of them informed the agent of the Land Association that the work was not done according to contract, whereupon the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The pleadings show that the Land Association contested the engineer's estimate upon very serious grounds, viz: incorrectness, due to fraud and collusion between Ford and the engineer, and nonperformance of the work according to the contract. While these issues have been found against defendants by the lower court, and cannot be re-examined here, yet there is enough in the statement of facts and the opinion to show that it was a very substantial controversy. The court states that "as to whether the work was completed according to the contract and specifications, there is a vast amount of conflicting expert testimony;" but finds that the acceptance by the engineer was conclusive. (Rec. p. 97.)

III.

There Is No Lien on the 22,000 Acres of Land Outside the Ditch and Right of Way.

It will be observed that in the notice filed a lien was claimed upon two distinct things, viz. (Rec. p. 95):

1. "The said ditch, and land appurtenant thereto for right of way, being of about the uniform width of sixty feet; together with all lateral ditches and reservoirs, and the land covered by and appurtenant to the same as aforesaid."

2. "Also 22,000 acres of land appurtenant to said ditch, and under said ditch and to be irrigated thereby," described as being in certain designated sections.

Three things may be subjected to a lien under the Mechanics' Lien law:

1. The building, ditch, or other structure. (Sec. 1520, *supra*.)

2. The land upon which it is constructed. (Sec. 1522.)

3. A convenient space about the same, or so much as may be required for the convenient use and occupation thereof; provided the land belonged to the person who caused the improvement to be made, or if not, then his interest. (Sec. 1522.)

The first of the subjects claimed in Ford's lien, embracing "the ditch and land appurtenant thereto for right of way," being about sixty feet in width, is no doubt property subject to the lien, if any exists. This also includes all three of the things provided for by the statute as above stated. It is evident that the lands appurtenant to the ditch for right of way, sixty feet wide, are those required for the convenient use and occupation of the ditch, and are all that are so required.

The second subject of the claim is 22,000 acres of land, which the finding of the lower court declares to be "outside of the ditches and reservoirs, and the right of way for the same;" that they were "appurtenant to said ditch and reservoirs, were under said ditch and to be irrigated thereby;" that "a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch;" that "all of said sections were situated between the line of said ditch and the river, and were enhanced in value by reason of its construction." (Rec. p. 96.)

It will be observed that neither in the claim of lien, the bill of complaint, the findings or decree of the District court, nor in the statement of facts by

the Supreme court of New Mexico, is there any statement that these lands, or any portion of them, are "required for the convenient use and occupation" of the improvement; which the law (sec. 1522) expressly requires "to be determined by the court on rendering judgment;" or that at the commencement of the work the land belonged to the person who caused the improvement to be constructed. Unless these two things concur, there can be no lien upon the land beyond that upon which the improvement is constructed. Not only do they not appear in the record, but it affirmatively appears that the land did *not* belong to the person causing the improvement to be made. It was owned by The Maxwell Land Grant Company, and not by the parties with whom Ford contracted. (Rec. p. 91.) It is alleged in the bill that the work was done with knowledge of the Maxwell Company, and that it did not give notice that it would not be responsible for liens, evidently in order to bring that company within the provisions of section 1529. But this section only applies to land *upon which* the improvement is constructed, and has no reference to appurtenant or other lands not actually occupied by the structure. The only case in which the owner is bound by the acts of others, or by his own silence, are those mentioned in sections 1520 and 1529. The first gives a lien on the improvement for work done at the instance of the owner, or his agents, and provides that every contractor, etc., shall be held to be the agent of the owner for the purpose of the act. The last, as to the improvements constructed *upon any land* with knowledge of the owner, gives a lien upon his interest therein, if he does not give notice, etc. But neither of these sections gives

any lien upon outside lands, or upon anything except the *improvement*, and the *land upon which* it is constructed.

The outside land cannot be subjected to a lien except by bringing it clearly and distinctly within the terms of section 1522. As to ownership, there is a complete failure to do so. It has been contended that the word "appurtenant" brings this land within the law. But the statute says nothing about "appurtenant," and when applied to this question the word is without meaning or value. If this land is required for the convenient use and occupation of the ditch, which would seem to be fully provided by the sixty-foot right-of-way strip, it would have been perfectly easy and natural to say so, and have it determined by the court on rendering the decree as the law requires. The learned court below holds that this land is required to make additional security for the builder, and that it should pass under the lien because the construction of the ditch enhances its value. If this proposition is sound, then a whole townsite would be liable to a lien for the cost of every business structure erected on the lots of individual owners. It is best answered, however, by citing some decisions of the Supreme court of California upon this identical clause in the California statute, from which the New Mexico statute was taken *verbatim*.

Green vs. Chandler, 54 Calif. 626, holds that where the complaint contains no allegation to that effect, the trial court had no authority to find that the whole of the parcel of land on which the building is situated was "required for the convenient use and occupation of said mill," etc.

In *Tunis vs. Lakeport*, 98 Calif. 285 (33 Pac.

Rep. 63), a mechanics' lien was foreclosed upon a hotel and saloon building, and a tract of land known as the "Fair-grounds tract" was declared by the trial court to be necessary for the convenient use and occupation of these buildings, and ordered sold. This judgment was reversed, and the court discussed the proper construction of this statute as follows:

"The expression, 'the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof,' should be construed to mean such space or area of land as is necessary to the enjoyment of the building for the purpose in view of its construction. The uses to which a building is to be put must manifestly, many times, determine the quantity of land necessary to the convenient use and occupation thereof. If erected as a mill for sawing lumber, the space required for a log and lumber yard would be regarded as necessary to its use, while like space around a similar building for a watch factory might not be at all necessary. This thing should be borne in mind: It is for the convenient use and occupation of the building that the land about the same is given by our statute. A flouring mill erected upon a large grain ranch would require a given space around it for the purposes incidental to its operations. It might require the whole ranch to create business for it. But it would not follow, under our statute, that the entire ranch would be subject to a lien for its erection. In the present case it is easy to see that the race track, with its training stables, grand stand, corrals and other improvements, may be necessary to create business for the hotel, club house and saloon, for which the building in question was constructed; but it is not at all apparent that they are necessary to the convenient use and occupation of the building for the purposes indicated. Their uses are foreign to its purposes, except as they may tend to bring custom to its doors."

The same court, in July, 1895, about the same time as the decision of the New Mexico court in this case, reiterated the doctrine of the last case in *Cowan vs. Griffith*, 108 Calif. 224 (41 Pac. Rep. 42). A lien was claimed for erecting a dwelling house on a forty-acre tract of land planted to figs and vines. The trial court found that the whole forty acres was necessary for the convenient use and occupation of the house, and decreed a sale of the whole to satisfy the lien. This judgment was reversed, the Supreme court saying:

"For the convenient use and occupation of this dwelling house it is very evident that forty acres of land is not necessary. The statute does not contemplate anything of that kind. It means exactly what it says—a sufficient space around the dwelling for its convenient use and occupation. It does not contemplate that sufficient land around the dwelling house to support the owner while living there be set apart. Very possibly forty acres would not be sufficient for such a purpose; and if the dwelling house was situated upon a section of farming land, upon the same line of reasoning as has been here adopted, the entire section should be set apart. Neither the productiveness or non-productiveness of the soil, nor the profit derived from the cultivation of the land, is a material element to be considered in determining the amount of land to be set apart with the dwelling house, under this section (1185) of the Code of Civil Procedure."

In the case at bar the effort is not simply to make the lien attach to a distinct tract of land on which the improvement is situated, but to include wholly different tracts, and subdivisions in other sections and townships, and which are not even identified with accuracy.

These lands do not by any means constitute a

compact body. Mere inspection of the section and township numbers shows that they are greatly scattered, with intervals between different sections of from one to three miles. The sections in Township 25 north, range 22 east, are three miles distant from the nearest of the others. The course of the ditch is said in the lien claim (Rec. p. 94) to be eastwardly, and as all the lands are said by the lower court to be between the ditch and the river (Rec. p. 96), it is apparent that they are from one to twelve miles distant from the ditch.

The description of these outside lands is wholly insufficient. They are in nowise identified so that an officer can ascertain what to sell, or a purchaser know what lands are encumbered or conveyed. They are said in the decree to be "22,000 acres of land * * * under said ditch and to be irrigated thereby, and described according to townships and sections as follows." Then follows an enumeration of forty-six complete sections, which, if regular, would contain 29,440 acres. Which 22,000 acres is intended does not appear; nor could any man, searching the records for the title to any quarter section within the forty-six sections mentioned, ascertain, either from the claim of lien or the decree of the court, whether it was included in the 22,000 acres or not. In the finding of facts by the lower court it is said that these lands "were included within the sections described in the notice of lien and bill of complaint;" that "it does appear that in a number of said sections only portions of the section were selected (under the contract of May 1, 1888) because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch." (Rec. p. 96.)

This makes it perfectly clear that there were considerable portions of the sections described not covered by the lien. In the opinion of the lower court it is contended that sixteen of these sections may have been fractional, and contained less than 640 acres; and that the rule that in descriptions of real estate quantity must yield to metes and bounds is controlling here. But it is well known that the discrepancies due to imperfect closings on the township lines are comparatively small, and could not be enough to reduce by three-fourths the total area of these sixteen sections, which would be required to account for the 7,447 acres difference. And the rule of construction invoked only applies where the conveyance is by metes and bounds, and quantity is only mentioned in addition. But such is not the case here. The description calls for *22,000 acres*, and this quantity is undoubtedly a controlling fact, because it must be taken in connection with the fact found by the court that only parts of the sections were irrigable and were selected or segregated by the Land Association under its contract of May 1, 1888 (Rec. p. 96), and the further fact that only 22,000 acres of land were allotted to the enterprise.

It is, therefore, as if the description read: "22,000 acres, being part of"—the forty-six sections, which would be palpably and incurably void for uncertainty.

Phillips on Mechanics' Liens, sec. 385.

It is not only the matter of uncertainty that is fatal here; but the moment it is admitted that only parts of these sections were selected as irrigable, and that they contain land in excess of the 22,000 acres of irrigable land provided for in the contract of May

1, 1888, as set apart for this enterprise, the decree becomes erroneous, because it necessarily includes more land than is connected with the ditch on any possible theory.

Appellants contend that in any event the decree must be reversed, with directions either to dismiss the bill for want of a sufficient lien, or to modify the decree as to the amount of the lien and the law covered by it.

Respectfully submitted,

FRANK SPRINGER,

Counsel for Appellants.

No. 89.

Brief of Wolcott & Vaile for

IN THE

SUPREME COURT

Filed Oct 28, 1897.

OF THE

UNITED STATES.

Office Supreme Court,
FILED
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JAMES H. McKEN
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OCTOBER TERM, 1897.

THE SPRINGER LAND ASSOCIATION, ET AL.,
Appellants,

vs.

PATRICK P. FORD,
Appellee.

No. 89.

BRIEF FOR APPELLEE.

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F. P. DUMARS, Manager.

ERRATA.

On page 5:

In the sixteenth line, the word, "customs," should be, "constructions."

On page 10:

In the second line, "*Campbell*," should be, "*Derrickson*," and "41," should be, "48."

In the fourth line, the same case is unnecessarily repeated.

In the eighteenth line, the first word, "*they*," should be, "*the court*."

On page 29:

In the tenth line from the bottom, the first word, "*section*," should be, "*sections*."

On page 32:

The first four citations should appear *before*, and *not after*, the 4th paragragh; they are cited in support of the preceding paragraph, the "3rd."

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BRIEF FOR APPELLEE.

Statement.

The statement of facts with which counsel for appellants opens his brief, based upon the findings in the *nisi prius* court, is substantially correct, so far as it goes; but this court will be guided by the statements of the finding of facts made by the

Supreme court of New Mexico, which are fully, but succinctly, set out in the printed record, at pages 77-97, inclusive; which statement will, as opposing counsel suggests, be taken as conclusive and final, so far as the evidence is concerned, upon this review.

Assignments Relied Upon by Appellants.

Eight specific assignments of error appear in the record (pp. 116-117), six of which are again formulated by counsel for appellants, at page 9 of his brief. But in the body of his argument only three of said assignments are insisted upon, although in the discussion of these three propositions some of the other questions are incidentally touched upon. We shall therefore content ourselves with discussing only those points insisted upon by opposing counsel in his argument; conceiving that the other contentions embraced in the assignments of error are waived and abandoned.

ARGUMENT.

I.

Construction of Mechanics' Lien Laws.

It is hardly necessary that we should specifically follow the argument of opposing counsel upon this question, nor comment severally upon the authorities cited by him. There can be no question, at this late day, that the courts "all practically agree that the theory is beneficent, and that when the theory and purpose of the law is to do substantial justice to all parties who may be affected, the statute should be fairly construed, so as to advance the remedy and accomplish the ends of justice. Essential departures

from its plain and obvious requirements will be fatal; but it is sufficient if there is a substantial compliance, in good faith, with its provisions."

Phillips on Mechanics' Liens (2d Ed.), sec. 16, p. 27.

Ibidem, §§ 14-18, inclusive.

2 Jones on Liens, § 1556.

Davis vs. Alvord, 94 U. S. 545 (549).

Knabb's Appeal, 10 Pa. St. 186 (188).

Rogers vs. Omaha Hotel Co., 4 Neb. 59.

Lumber Co. vs. Russell, 22 Neb. 126.

DeWitt vs. Smith, 63 Mo. 262.

Calhoun vs. Mahon, 14 Pa. St. 56.

While all recognize this general principle, the decisions of each State differ somewhat in applying the principle to individual cases, the difference arising not from a fundamental difference of opinion as to the general principle, but from the necessity of conforming to the mechanics' lien law of the particular State wherein the decision is made, such laws being almost as various as the number of States in the Union. Hence, it is always necessary for the proper understanding and application of a decision passing upon rights arising under a mechanics' lien law, to examine the statute under which the decision was made; since propositions laid down in decisions frequently seem exactly applicable to a case under discussion, when, upon an examination of the statute under which such decision is made, it is found that that particular decision cannot possibly have any proper application to or influence upon the case in support of which it is cited. An examination of many of the authorities cited by counsel for the appellants in this case will exemplify the truth of this contention.

II.

Application of New Mexico Lien Law to This Case.

The first proposition discussed by counsel for appellants is, that the lien claim filed by the appellee in this case did "not contain any sufficient or correct statement of his demand."

The opinion handed down by the Supreme court of New Mexico in this case goes very fully, methodically and logically into a discussion of the essential features of a lien claim under the New Mexico statute. (See printed record, pp. 103-107, fols. 123-128, inclusive.) The New Mexico statute (N. M. Comp. L. 1884, § 1524) requires that the lien claim shall contain "a statement of the lien claimant's *demands*, after deducting all just credits and offsets." Referring to the claim filed by appellee (printed record, pp. 94-95), we find that the appellee's lien claim contained the *statement of two demands:* to-wit: 1st, *a demand* for "$17,634.27, the balance due and owing to said Patrick Ford by aforesaid owners or reputed owners, after deducting all just credits and offsets, for excavating and embankments done and performed by him, etc."; and, 2nd, *a demand* for "the further sum of $390, for extra excavating and hauling, ordered by the engineer in charge of said ditch and allowed by him in pursuance of the provisions of said contract.

As was said by the Honorable Supreme court of New Mexico, this lien claim "is in full and substantial compliance with all the essential requirements of the statute" upon this point. (Printed record, fol. 129.)

There is nothing, we submit, in the authorities cited upon this point by counsel for appellants which is inconsistent with, or contradictory of, this finding of the New Mexico court.

The case of *Warren vs. Quade*, 3 Wash. (State) 750, although decided, as suggested by counsel for appellants, under a statute similar to the New Mexico statute, does not in any sense pass upon the particular provision which opposing counsel rely upon here. There is no consideration or comment in said case of the provision of the statute requiring that the lien claim shall contain a "statement of his, demand"; and all that is said in the opinion in that case is expressly applied to other terms and provisions of the statute, which are in no way attacked by the appellants in this case.

With all due respect to the Washington court, we submit, further, that the propositions laid down by that decision are not in accord with well established customs and the almost universal trend of decision upon the questions discussed by the Washington court; and it is noteworthy that said court does not cite a single authority in support of the positions taken by it.

In the other Washington case cited by counsel for appellants, *Tacoma Lumber Co. vs. Wilson*, 3 Wash. 786, there is no separate discussion made, or opinion handed down, but a mere reference to the preceding case.

The contention of counsel for appellant is, that under this provision of the New Mexico law, the lien claim must not only contain a "statement of the claimant's demands," but must go further and embody an itemized account of the transactions between the parties. We submit that there is a radical difference between a "statement of demands" and "a just and true account showing what the materials were, the work that was done, and the price charged." The New Mexico statute simply requires a "statement of the demands" asserted against the property. In many other States the statutes require "a just

and true account" of the transactions between the parties. Under the general proposition with which we started out, each case is controlled by the statute out of which it arose. In New Mexico, "*a statement of the demands*" asserted *is sufficient*. In Pennsylvania, Missouri, Virginia, and some other States, "a full and true account" of the details of the transaction is by statute essential.

Let us examine some of the authorities relied upon by counsel for the appellee.

Null vs. Swineford, 6 Penn. 187, was under a statute which required that the lien claim should state "the amount or sum claimed to be due, and the nature and kind of the work done, or the kind and amount of materials furnished." In the particular case, the claimant simply claimed a lump sum, for both "carpenter's *work done* and *for lumber furnished;*" and the court held that this was a failure to comply with the statute, in an essential particular. But this very case expressly lays it down that "a substantial compliance with the statute is all that is required," and this proposition was approved and reannounced repeatedly thereafter; as, for instance, in 8 Pa. State, 473, 9 *Ib.* 449, 10 *Ib.* 186; in all of which *Null vs. Swineford*, was cited and approved upon this point.

Rude vs. Mitchell, 97 Mo. 366, *Heinrich vs. Carondelet*, 8 Mo. App. 588, and *Burns vs. Capstick*, 46 Mo. App. 397, were all decided under a statute radically different from the New Mexico statute and expressly requiring the filing of "a just and true *account*." But even under such a statute the Missouri courts, in *Hilliker vs. Francisco*, 65 Mo. 598, cited and approved in 20 Mo. App. 90, 28 Mo. App. 642, 44 Mo. App. 34, 104 Mo. 23, and other cases, held that, in a case such as the one now under dis-

cussion, an account containing simply a *lump item*, is sufficient.

The cases of *Shackleford vs. Beck*, 80 Va. 573, and *Valentine vs. Rawson*, 57 Ia. 179, were decided under statutes so radically different from the New Mexico statute that said decisions cannot properly have any influence or be of any value as guides to a proper decision of this point, under the New Mexico statutes. Furthermore, when we come to read the explanation of the ruling in *Valentine vs. Rawson*, as made in 69 Ia. 656, it is perfectly clear that even under the Iowa statute the Supreme court of that State did not intend to be understood as laying down any such proposition as that contended for herein by counsel for appellant.

In *Wagner vs. Hanson*, 103 Cal. 104, the statement made in the lien claim was ambiguous, so that it did not afford the clear and definite information which is contemplated in all mechanics' lien laws.

All of the authorities cited by counsel for appellant in support of his contention upon this point may be disposed of by the citation which he makes from 2 *Jones on Liens*, sec. 417:

> "Statutes, *which require a true account* of work done or materials furnished, imply an itemized or detailed statement of the transactions which are the foundation of the lien."

But there is certainly nothing in said text book, nor in the cases cited by opposing counsel, which can make such an itemized *account* necessary, under a statute *which does not require* any such thing, but only calls for "a statement of the claimant's *demands*." If the New Mexico legislature had intended any such provision as that which opposing counsel attempts to read into the statute, it would not have

required only "a statement of his demands," but would instead have called for "a statement of the *accounts*" between the parties, as do the statutes of the States from which appellants' authorities are cited.

> Phillips on Mechanics' Liens (2d Ed.), §§ 352-3.
>
> *Brennan vs. Swasey*, 16 Cal. 140.
>
> *Selden vs. Meeks*, 17 Cal. 130.
>
> *Heston vs. Martin*, 11 Cal. 41.
>
> *Young vs. Lyman*, 9 Pa. St. 449.

Nor was it necessary for the lien claim to state the relation existing between the claimant's employer and the owner of the property; the statute required the lien claim to contain, "the name of the owner or reputed owner," and

> "Also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract."
>
> Sec. 1524, Compiled Laws New Mexico.

A lien claimant is required only to meet, in a reasonable manner, the requirements of the statute under which he is attempting to perfect his lien. There is nothing in the New Mexico statute which requires in any way that the lien claim should state the relation between the owner of the property and the person by whom the claimant was employed, or to whom the claimant furnished materials.

Upon this point the requirements of the California statute are identical with the requirements of the statute of New Mexico. Under this California statute the Supreme court of California, in the case of *Lumber Company vs. Gottschalk*, 81 Cala., page 646, says:

> "There is nothing in the section, or any other, that requires the material man to state in his claim of lien what relation the person to whom he furnished the material bore to the owner, whether contractor or agent; nor does the burden of determining whether any contract, made or attempted to be made, between the owner and contractor was completed or not rest on him, when he comes to file his lien. He must state the facts required by the statute. Whether the person to whom he furnished the material had authority to bind the owner and entitle the material man to a lien, *is a matter of pleading and proof at the trial.*"

In this case it was determined that the contract between the owner and the person to whom the material was furnished, was void, and yet the lien was sustained.

It is not even necessary that the notice of lien should state that the owner of the land had knowledge of the work. It is sufficient if such knowledge be alleged and found.

Jewell vs. McKay, 82 Cala. 144.

III.

The second contention relied upon by appellants is that "the amount claimed in the lien was excessive, because no cause of action existed upon the final estimate." (Brief for appellants, p. 20 *et seq.*)

We have been unable to satisfy ourselves which of the assignments of error made in this cause (printed record, pp. 116-17) authorizes or covers the contention thus formulated by appellants. It certainly is not covered by assignment 2, since the law is now completely settled that a lien claim is not invalidated merely because the claimant claims therein *more* than he is entitled to.

Phillips on Mechanics' Liens (2d Ed.), § 356.

Edwards vs. Campbell, 28 N. J. L. (39) 41.

Edwards vs. Derrickson, 28 N. J. L. 39.

Shattuck vs. Beardsley, 46 Conn. 386.

N. S. I. Wks. Co. vs. Strong, 33 Minn. 1.

Smith vs. Headley, 33 Minn. 384.

Barber vs. Reynolds, 44 Cal. 519.

Thomas vs. Huesman, 10 Ohio St. 153.

If, then, the contention that the demand made in this lien claim was excessive is not covered by the second assignment of error, it does not seem to us that any other of the assignments are sufficient to entitle appellants to a review of this case, upon the ground of such excessiveness, if any existed.

As, however, it is a question between this Honorable court and the appellants, as to whether they will consider the contention if it is not covered by the assignments of error, we will proceed to consider the reasons which appellants advance in support of this proposition.

Their first reason is, that "the final estimate of $12,625.53 was not yet due;" and in support of this contention they quote a provision of the contract as follows:

> "The amount due to the contractor *under the final estimate* will only be paid upon satisfactory showing that the work is *free from all danger* from liens or claims of any kind, through failure *on his* [*Ford's*] *part* to liquidate his just indebtedness, as connected with this work."

The italics are ours, and we think that they demonstrate that appellants' contention is not well founded. From the findings of fact made by the

New Mexico Supreme court, the following are shown to be true:

First: That on the thirteenth day of June, 1889, when appellee's work was completed and accepted, and on June 19, 1889, when there was a conference between the various contractors, on the one hand, and their employers on the other, and on the third day of July, when Ford filed his notice of claim, there was *not* "*any danger* from liens or claims of any kind" by the subcontractors, as contemplated by this provision of Ford's contract.

Second: That if there was any danger from such liens or claims, it was *not through failure on Ford's part* to liquidate his just indebtedness in connection with the work.

Third: That the final estimate, which the contract authorized to be temporarily withheld, did not amount to the sum of $12,625.53, but that this sum embraced, in addition to said final estimate, the ten per cent reserved, and that, over and above this amount, there was also due the appellee considerably over $5,000 on the 6th (or May) estimate.

(1) Appellants repeatly contend, throughout their brief, that Ford is bound by the strict letter of his contract, and that no matter how unreasonable that contract may seem to this court, or how inequitable it may be to enforce it, nevertheless, the contract having been made, the parties are bound by it, and the court is bound to enforce it according to its letter.

Under the state of the facts disclosed by this record, we do not consider it important to inquire whether this contention of counsel for appellants is correct. But if such is the law, then unquestionably Ford's subcontractors are bound by the clear, unequivocal and positive provisions of their contracts

with him. One of the provisions of those contracts is (printed record, p. 92):

"That the amounts due the subcontractors on the monthly sub-estimates"—provided for in said contracts—"should in no case be demanded or paid in advance of the regular estimate,"—that is, the estimate to be made under the contract between Ford and The Springer Land Association.

The record clearly shows that promptly and invariably upon the payment of the regular estimates to Ford, his subcontractors were fully and completely paid; that the sub-estimates for the month of May and the final sub-estimates were not paid, because the regular estimate under the Ford contract for the month of May and the final estimate were not paid by Ford's employers, the appellants. Thus it will be seen that there never was any amount *due and payable by Ford* to his subcontractors or any of them. If they had instituted suits against Ford for the amounts due upon their subcontracts, they could not have recovered, because, under the express and unequivocal terms of their contract with Ford, those amounts never became due and payable by him to them.

Therefore we say that under the facts disclosed by this case, there was not on June 13 or June 19, 1889, and never was, *any danger of liens* successfully maintained, or of claims successfully asserted, by these subcontractors; and accordingly we find that although lien claims were filed and suits instituted by these subcontractors, yet at the time this case was tried, only one (that of subcontractor Dargle) of those claims or suits was in existence; and so far as this record shows, no attempt has ever been made to push that suit or enforce that claim by the lien claimant; from which the fact is necessarily apparent that the Dargle lien claim and

suit never amounted to anything, so far as these appellants are concerned. The decree, moreover, of the New Mexico court fully protected the appellants from any possibility of harm or loss by reason of the Dargle lien claim and suit.

(2) Now, going a step further: It is clear that if there ever was "any danger from liens or claims of any kind" upon this property, it was *not "through failure on Ford's part* to liquidate his just indebtedness, as connected with this work." The record shows that as rapidly as he was paid up by The Springer Land Association he paid off his subcontractors, as required by his contracts with them and by his contract with The Springer Land Association. He did not pay them the amounts of their respective sub-estimates for the month of May, for the simple reason that The Springer Land Association, without cause and without any excuse or any attempt at explanation or justification, failed to pay him the amount of the regular May estimate; and since the regular estimate had not been paid to him, there was nothing demandable of, or payable by, him to his subcontractors. The default in the payment was wholly by reason of the failure on his employers' part to liquidate their just indebtedness to him; and the record shows no just excuse for this failure and delay; for it clearly appears that it never occurred to these appellants to dispute the correctness and justice of Ford's claim until the nineteenth day of June, 1889, *nearly six weeks after the May estimate was due and payable* under the contract.

It is very suggestive to note here another instance of "How great a fire a little matter kindleth;" for it is clearly apparent, we think, from this record, that this whole controversy originated in, and grew little by little out of, a piece of bad temper on the part of subcontractor McGarvey. It is appar-

ent from the statement of facts (printed record, pp. 93-94) that the appellants, on the nineteenth day of June, 1889, sent their representatives to meet Ford, for the purpose of paying off the amounts due upon the estimates made by the engineer Kellogg and not questioned or disputed by the appellants, and of closing up the transactions under this contract. At that time, the May estimate and the final estimate, and the claim for extra work, were all in the hands of appellants. That they had no idea at that time to dispute the correctness of Ford's claim, or the faithful performance of his contract by him, is apparent from the fact that they sent their representatives with a deed to real estate representing $8,000, and cash or its equivalent to the amount of $17,000, which would be amply sufficient to pay their indebtedness to Ford, without deduction or controversy. All through the negotiations on the nineteenth of June, they were apparently offering and prepared to settle with Ford, at the figures fixed by their engineer, Kellogg; and the only things which stood in the way of the settlement in accordance with those estimates was a quibble between the Maxwell company and the Springer association, about the deed which was to be delivered to Ford, and between Ford and McGarvey over the paltry sum of $300. In the irritation of McGarvey, arising out of his dispute with Ford over this amount, while they were attempting to reach a satisfactory settlement between them, McGarvey suggested to the agent of The Springer Land Association that the work was not done according to the contract, and immediately the appellants broke off all negotiations, and utterly refused, and have since continued to refuse, to pay their debt to Ford, or any part thereof. The findings of the court show that this ill-tempered assertion of McGarvey's was absolutely untrue, and without foundation. Yet

appellants, on the nineteenth of June, 1889, and ever since, have made it the excuse for refusing to pay the appellee the moneys due him for work done for, and accepted, approved and ever since enjoyed by, them. Ever since that date they have enjoyed the benefit of his labors, and withheld the moneys which they solemnly bound themselves to pay therefor.

It is fair to presume and assert, that if these appellants had not jumped at the slander suggested by the irritated McGarvey, and made that an excuse for not carrying out their contract, the whole controversy would have been adjusted on said nineteenth day of June, 1889; for it is impossible to believe that so paltry a sum, comparatively, as $300 would have induced Ford and McGarvey, or either of them, to finally refuse to adjust their differences. Where $5,000 was in hand ready to be paid to the one, and more than $12,000 to the other, it would not have been in accordance with human nature for either of them to have failed to make some concession if necessary for the purpose of a settlement.

It is perfectly clear, therefore, that whatever liens or claims were made or filed by the subcontractors were not caused through *any failure on the part of Ford* to liquidate his just indebtedness, but solely on account of the failure of the appellants to pay their contract indebtedness.

The contracts between Ford and his subcontractors were made under the supervision of, and approved by, Kellogg, the authorized representative of the appellants. It is nowhere contended by the appellee that said subcontracts in any way abrogated the provisions of specification 15 of the principal contract, nor that the subcontracts in any way modified the effect of the principal contract or attempted to substitute a new contract therefor. Therefore it is not necessary for us to follow opposing counsel in

his discussion as to whether or not Kellogg's agency was sufficient to authorize him to make a new contract.

(3) The provision of the contract quoted by counsel for appellants at page 21 of his brief did not authorize or justify appellants to withhold the entire amount due Ford on the nineteenth of June, 1889. That provision only authorized them to temporarily withhold, if at all, "the amount due the contractor under *the final estimate*." Now, it will be seen from the record, that on the thirteenth day of June, 1889, when Ford's work was completed and was accepted by the engineer, that there was due Ford: 1st, the amount of estimate No. 6 (the May estimate), $5,010.93; 2nd, the ten per cent of the amounts of the six estimates, retained under the provisions of the contract, and amounting to one-ninth of $35,928.03, or $3,992; 3rd, by deducting this last amount from the footing on page 93 of the printed record ($12,625.53), we get the amount of *the final estimate* itself, $8,633.53; and, 4th, the amount due Ford for extra work done in accordance with the contract, $390. Thus we see that on the nineteenth day of June, 1889, the appellants owed to appellee $9,392.92, over and above the amount of the final estimate, and not including interest on overdue payments.

Even on the tenth of May, when the 6th estimate became due, the appellants had in their hands over $9,000 belonging to Ford, to-wit: the May estimate, $5,010.93, and the ten per cent retained, $3,992; the entire amount of liens claimed by the subcontractors, including the final sub-estimates, amounted to only about $7,500. Thus we see that counsel for appellants is incorrect in statement "1" on page 25 of his brief; and furthermore, we fail to see how the fact asserted would help his case, even if it were true.

The authorities cited by opposing counsel in support of his contention upon this branch of the case, as found at page 23 of his brief, do not aid him, because the facts show that *Ford had performed all the duties* incumbent upon him under the provisions of his contract, and brought him entirely within the rules laid down in those authorities; and also because those authorities are equally applicable to the contracts between Ford and his subcontractors, and they show that there was never at any time any amount *due by Ford* to said subcontractors under these contracts. Therefore, that any liens filed or claims made against this property did not result from any default or dereliction of duty on the part of Ford himself. They were made necessary by the defaults and wrongdoings of the appellants, in order that said subcontractors might protect themselves *as against said appellants*, and *not as against appellee*.

On page 26 *et seq.*, counsel for appellants advances, as a second reason why he contends that the lien claim was excessive, that appellants were entitled to "a credit of $8,000 for payment in land," which Ford agreed to accept in part payment of the final estimate. The court below found, and the recorded facts show, that the appellants never *delivered or tendered* to Ford any deed for such land. On the nineteenth of June, 1889, the agent of the Maxwell company had in his possession a deed conveying a section of land to Patrick Ford. This deed was not delivered or tendered to Ford, but the Maxwell agent notified the Springer agent that said deed was ready to be delivered to Ford upon payment of $4,000 by The Springer Land Association. The Springer agent notified Ford that he was willing to pay the $4,000, if Ford would settle with his subcontractors. Thus we see that the real fact was, that the deed was tendered by the Maxwell agent to

the Springer agent upon the condition that the latter would pay $4,000. The Springer agent did not perform the condition and accept the deed; he did not make any tender of the deed to Ford; but he simply notified Ford that if he, Ford, would perform a certain thing, which The Springer Land Association had made it impossible for him to perform, then he, the Springer agent, would obtain the deed for delivery to Ford. We see, also, that The Springer Land Association never put itself in a position to deliver or tender the deed to Ford, because they never had possession of the deed or any absolute and unconditional right to it.

Not only was there never any actual or constructive tender of the deed to Ford, but there never has been, from that day to this, any offer to deliver or declaration of a readiness or a willingness to deliver said deed. The appellants have wholly failed and refused to deliver any such deed, as they have failed and refused to pay any of their indebtedness to Ford; and this, notwithstanding the fact that long ago all the claims of the contractors have been adjusted and settled, and not one of them is in existence to-day; and notwithstanding another fact also: that there was due Ford, over and above said $8,000, at least $1,500 more that the total amount of all the demands of the contractors.

The authorities cited by appellants in support of this contention (see appellants' brief, pp. 28-31) have, we think, somewhat of a "boomerang" effect upon them. *Quoad* this deed, the appellants are "the parties seeking specific performance," and under their authorities they "must show, as a condition precedent to obtaining their remedy, that they have done or offered to do, and were at the time of the institution of this suit ready and willing to do, all the essential and material acts required of them

by the contract." The record shows that Ford carried out the conditions of the contract by him to be kept and performed. He selected the land; he made no objection to the deed, and would have been entirely willing to receive it, on either the thirteenth or the nineteenth day of June, 1889. All that is left undone in the carrying out of this contract remains unfulfilled on the part of the appellants; and therefore, under their own authorities, we submit that they cannot now call upon the appellee to accept this deed, nor can they complain of the court for failing to require him to accept it, when it clearly appears that they, who are now seeking equitable relief, have wholly and persistently failed to do equity, and when they have never indicated to the court nor to Ford a willingness or readiness to deliver the deed.

At page 31 of brief for appellants we find the contention that "the decree is clearly erroneous as to the sum of $390 claimed in the lien for extra work." The contract (specification 11; printed record, p. 80) provides for the doing of, and paying for, extra work. Specification 14 (on the same page) requires that all orders of the engineer concerning any part of the work must be promptly obeyed. Folio 70 of the record shows that extra work was performed, under the direction of the engineer, and that the bills therefor were authorized and approved by said engineer, to the amount of $446.85, of which no part, except $14, has ever been paid. At page 93 of the record, referred to by opposing counsel, the court states that the total amount, stated to be due Ford by the engineer's estimates, at the date of the acceptance of the work by the engineer, was $17,636.45. But it was evidently not intended that this amount should be understood to include the said $390 shown to be due for extra work. This was not a part of the engineer's estimate at the date of the

acceptance of the work, for the simple reason that, as the record shows (fol. 70), this extra work had been done, allowed, and the bill therefor authorized and approved, long before the date of the acceptance of the work; and the record (at fol. 118) clearly shows that at the date of the completion and acceptance of the work there was due $17,634.27 upon the engineer's final estimates, and also "$390 for extra work"; and it appears that at the time Ford filed his lien claim herein, and ever since, this $390, like the larger sum, has never been paid, in whole or in part. Since there can be no question, upon the record, that this amount was unpaid, and that the work represented thereby had been done, it was proper matter to be included in appellee's lien claim; and furthermore, appellants' brief (p. 32) shows that their counsel recognizes that their contention upon this point could not be sustained, and this lien claim invalidated, even if appellee's demand was overstated by the amount of this $390. The hesitating and half-hearted manner in which this contention is made shows that counsel for appellants has no confidence in it, and makes it unnecessary for us to spend further time over it.

As counsel for appellants does not in his brief contend for any other defect or insufficiency in the lien claim herein, it does not seem requisite for us to take the necessary time and space to show that this lien claim was in full compliance, in all respects, with the statute. This question is taken up in the opinion of the Honorable Supreme court of New Mexico, which appears at pages 101-115 of the printed record, and there the essentials of a lien claim under the New Mexico statute are taken up, item by item, and the lien claim herein shown to be

"in full and substantial compliance with all the essential requirements of the statute."

There is, however, one matter injected—incidentally, and apparently without any real reliance placed thereon—under the first contention of appellants attacking the sufficiency of the lien claim herein. At page 16 of appellants' brief we find it asserted that:

> "There is nothing in the claim, or contract attached to it, to show how the land of the owners, The Maxwell Land Grant Company, can be encumbered for the work done under a contract with an entirely different party.
>
> "When the work is not done for the owner of the property, the relation of the person for whom it is done occupies to such owner must be so stated as to bring him under the list of those who, under the lien law, are authorized to bind such owner."

The last paragraph of this assertion, as we have already shown, is not a correct statement of the law, under a statute such as that of New Mexico.

But it is not necessary to waste more time and space in showing the falsity of this contention; because, even if such *were* the law, the appellee brought himself fully within its requirements. Section 1520 of the statute (appellants' brief, p. 10) gives the claimant a lien upon the property, "for work done, etc., at the instance of the owner of the building or other improvement, or his agent," and expressly provides that "every contractor * * * or other person having charge of * * * the improvement as aforesaid, shall be held to be the agent of the owner, for the purposes of this act;" and section 1529 of said act (appellants' brief, p. 11) provides that "every building or other improvement

constructed upon any lands with the knowledge of the owner, etc., shall be held to have been constructed at the instance of such owner * * * unless such owner, etc. * * * shall give notice that he will not be responsible for the same, etc."

The record shows that in May, 1888, a contract was entered into between The Maxwell Land Grant Company and the predecessors of The Springer Land Association, for the construction of this irrigating system, for the purpose of improving the 22,000 acres of land mentioned in this case. Said contract is set out at pages 81-91, inclusive, of the printed record; and at folio 106 said contract expressly made The Springer Land Association "the agent of The Maxwell Land Grant Company," with plenary powers in the premises to do all acts necessary to carry out the improvement proposed, and to sell and dispose of the lands proposed to be benefited by said improvement. Under and by virtue of this contract, The Springer Land Association employed the appellee to construct the improvement provided for in its contract with The Maxwell Land Grant Company. The record bears internal evidence that all through the transaction between The Springer Land Association and appellee, The Maxwell Land Grant Company was aware of what was going on; so much so, that when the appellee's work was completed and accepted, and the day of final settlement came, the Maxwell Company sent its representative to be present at, and carry out its portion of, said settlement. Under this state of facts, it seems to us impossible to escape the conclusion that the appellee was entitled to a lien upon this 22,000-acre tract of The Maxwell Land Grant Company, both under said section 1520 of said statute and under section 1529 thereof.

Moreover, upon this point we submit that it was wholly a question of fact as to whether or not the

Maxwell Company, the holders of the legal title to this tract, were the persons at whose instance this improvement was made; and it was also a question of fact as to whether or not the Maxwell Company knew, at the time this work was going on, that the improvement was being made, so as to bring them within the terms of said section 1529. The New Mexico courts, both District and Supreme, found for the appellee upon both of these facts; and we submit that their finding will by this court be taken as conclusive of the matter.

In section 1522 of said act (appellants' brief, p. 10) we find that the lien given is upon the land belonging "to the person *who caused the improvement to be constructed.*" Unquestionably, the Maxwell Company was the party who caused this improvement to be constructed, for it was "projected," authorized and contracted for by the contract of May, 1888, and detailed specifications therein made, as to how, when and by whom the improvement was to be carried out.

IV.

The third and last contention upon which counsel for appellant relies in his brief is, that there could be no lien upon the 22,000 acres of land which lie outside of the land actually covered by the right of way for this irrigating ditch.

The statute gives a lien: 1st, upon the improvement itself; 2nd, upon the land upon which the improvement is constructed; 3rd, upon so much of the land as may be required for the convenient use and occupation of the improvement.

The meaning and extent of the third item is the only one as to which there is any controversy in this case. The appellants contend that appellee's lien only attached to the strip of land, sixty feet wide

and twenty-six miles long, upon which the improvement was actually constructed. The appellee contends that the entire 22,000-acre tract of land is required for the convenient use and occupation of the improvement constructed. As we have already demonstrated, from the record, this 22,000-acre tract is admitted to belong to the Maxwell Company, and the record shows, by documentary evidence, that this company was "the party who caused the improvement to be constructed" upon said land.

The statement made by counsel for appellants, at page 34 of his brief, purporting to be declarations of the New Mexico court, we submit is inaccurate and misleading. That court did not *declare* that this 22,000 acres of land was "outside of the ditches and reservoirs and the right of way for the same." These words were used descriptively, and not declaratively, and they lose their proper significance and effect when segregated from the sentence and connection in which they are used. The New Mexico court did not say that a number of these 22,000 acres, or that any portion of them, was not flooded, or situated so as to be irrigated, with water from this ditch. This language was used in reference to "the particular sections described in the pleadings," which the appellants contend contain nearly 30,000 acres; and the court, in using the language quoted by counsel for appellants, used it in reference not to said 22,000 acres of land or any part thereof, but, on the contrary, said "that in a number of said sections only portions of the section were selected, because a number of them were not flooded nor situated so as to be overflowed with water or irrigated from the ditch." The court is, in this sentence, speaking of the "sections" mentioned in the contract of May, 1888, apparently, and the sections mentioned in the lien-claim were selected by the Springer Association

because they are under or appurtenant to this irrigating system.

The description of the land claimed in the lien claim, being in accordance with the United States survey, and being particular, is the description which controls; the mention of 22,000 acres being a matter uncertain in its nature as connected with a more particular description in accordance with the government survey.

The appellants' counsel makes an argument from an alleged discrepancy between the acreage of the land given, to-wit, 22,000 acres, and the number of sections specifically mentioned, to-wit, forty-six sections, and deems this matter of discrepancy such a capital point that it is urgently pressed at two places in the appellants' brief.

(See appellants' brief, pages 39 and 40.)

This argument is based upon the supposition that every section contains 640 acres of land, and that, as there are forty-six sections mentioned, there must be 29,440 acres included in the description, while only 22,000 are claimed, and counsel naively say: "which 22,000 acres is intended does not appear, nor could any man searching the records for the title to any quarter section within the forty-six sections named ascertain from the claim whether it was included in the 22,000 acres or not."

Counsel have overlooked a fundamental principle affecting surveys of public lands which necessitated a statutory provision as to government surveys, and that is, that a congressional township of thirty-six sections does not necessarily contain thirty-six times 640 acres. That by the very necessity of surveying, a necessity which arises from elementary facts, which, of course, it is not necessary here to explain even for the benefit of counsel for the appellants, there is almost invariably either an excess or a

deficiency in the acreage in a township, and to provide for this necessary fact, a statute of the United States particularly enacts as follows:

> "Where the exterior lines of the townships which may be sub-divided into sections or half sections exceed or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the *western and northern ranges of sections or half sections* in such township, according as the error may be in running the lines from east to west or from north to south. The sections or half sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity."
>
> Revised Stats. U. S., p. 439, sec. 2395, 5th clause.

If the distinguished counsel for the appellants will upon a plat locate the particular sections designated in the claim of lien in this case, he will find that out of the forty-six sections named, nine of them are in the *northern range of sections* in the townships in which they are located. He will also find, upon a similar examination, that seven of these designated sections are upon the *western range* of sections in the townships in which they are located. Therefore, out of the forty-six sections there are sixteen which are subject to a possible deficiency which may fully cover the entire difference between the 22,000 acres and 29,440 acres, and as the appellants, defendants in the court below, did not introduce any evidence to show the actual acreage of the sections named, they can now derive no argument such as is attempted in appellants' brief.

In view of this argument of counsel for appellants, it is worth while to note, also, that appellants are estopped from making any contention of a discrepancy between acreage and description, by reason of the fact that the answer in express terms admits both description and acreage, in the very terms alleged in complainant's bill and in the claim of lien.

See Printed Record, p. 21, fol. 103.

"There is a great reluctance to set aside a mechanics' lien merely for a loose description."

Phillips on Mechanics' Liens (2nd Ed.), § 379.

McClintock vs. Rush, 63 Pa. St. 203.

"It is not necessary that the description should be either full or precise. Certainty to a common intent is the rule."

McClintock vs. Rush, 63 Pa. St. 203.

Kennedy vs. House, 41 Pa. St. 39.

Whitelake Lumber Co. vs. Russell, 22 Neb. 126.

Dewitt vs. Smith, 63 Mo. 263.

"The mention of the quantity of land conveyed may aid in defining the premises, but it cannot control the rest of the description."

Devlin on Deeds, vol. 2, sec. 1044.

The mention of 22,000 acres in the lien claim is an immaterial matter, and goes simply in aid of the description, and if inaccurate is controlled by the particular description of metes and bounds, or by description in accordance with the United States government survey.

The assertion of quantity in a deed must yield to a description by metes and bounds, or by name and number.

Stanley vs. Green, 12 Cala. 148.
DeArguello vs. Greer, 26 Cala. 632.
Wadhams vs. Swan, 109 Ill. 46.
Ufford vs. Wilkins, 33 Iowa, 110.

In ascertaining the land that has been conveyed by a deed, a call for quantity will be rejected when inconsistent with the actual area of premises as particularly described.

Ware vs. Johnson, 66 Mo. 662.

Metes and bounds will convey the land embraced by them, although the quantity vary from that expressed in the deed, on the principle that the less must yield to the greater certainty.

Belden vs. Seymour, 8 Conn. 18.
Hatch vs. Garza, 22 Texas, 177.

Where a deed describes land by government survey and by metes and bounds as containing 702 acres, held, that the words as to quantity were descriptive.

Wright vs. Wright, 34 Ala. 194.
Powell vs. Clark, 5 Mass. 355.
Large vs. Penn, 6 S. & R. 486.

Quantity must yield to boundaries or numbers if they do not agree.

Doe vs. Porter, 3 Ark. 57.
Chandler vs. McCard, 38 Me. 564.
Large vs. Penn, 6 S. & R. 486.
Jackson vs. Livingston, 15 Johnson, 470.

Dale vs. Smith, 1 Delaware Chan. 1.
Jennings vs. Monk, 4 Metcalf (Ky.), 106.

It must be noted, however, that, because only 22,000 acres are mentioned as being the quantity of land "outside of the ditches and reservoirs and the right of way for the same to which the 22,000-acre tract is appurtenant," it by no means follows that *all the sections of land*, named in the lien claim, were not properly included therein and covered thereby. Over and above these 22,000 acres, there was the land which, even the appellants admit, is properly chargeable with the lien, to-wit, the land actually covered by the ditch system and its right or rights of way and by the reservoirs constructed in connection with it. As the ditch itself was twenty-six miles long it necessarily covered a considerable acreage; and there is nothing to show how much land was covered by the various reservoirs, and the residue of the irrigating system which appellee constructed, but, in the very nature of things, these must have also required a considerable acreage. It would not be unreasonable to presume that these took all the land, outside of said 22,000 acres, which is contained in the sections named in the appellee's lien claim and in his bill of complaint, and as the court below decreed him a lien upon all the land contained in the section described, this court is bound to conclude that all of such land was included in said 22,000-acre tract and the land occupied by the said ditch, reservoirs constructed by appellee, and the rights of way belonging thereto.

The court expressly holds (p. 96) "that it appears by the admissions, pleadings, and from the testimony, that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same, were appurtenant to the said ditch and

reservoirs, and were under said ditch and to be irrigated thereby. Thus it will be seen that each and all of these 22,000 acres were appurtenant to and irrigated by this ditch, and were intended to be, and were, benefited by the ditch. And the court goes further, and says, incidentally, that not only these 22,000 acres but all of the various sections situated between the line of said ditch and the river were enhanced in value by reason of its construction.

The contract of May 1, 1888, shows that the Maxwell Company caused this improvement to be made, for the purpose of supplying water to the entire 30,000 acres of land which were under said ditch; and in consideration of the construction of this improvement, they gave to The Springer Land Association a one-half interest in 20,000 acres of the 22,000-acre tract, the other 2,000 acres being reserved by the Maxwell Company. (Printed record, p. 97.)

In said contract said 22,000 acres are not spoken of as separate and distinct tracts or parcels of land, as appellants would now have this Honorable court believe them to be; but it is expressly spoken of as "said tract of 22,000 acres." (Printed record, p. 83.) The contract evidently contemplated that after the improvement was constructed, said 22,000-acre tract should be cut up and sold in small holdings; and the Maxwell Company caused the improvement to be made for the express purpose of making saleable a portion of its large holdings, which up to that time were evidently without market value and unavailable for agricultural purposes. But at the time the improvement was projected and constructed, it was upon the property *as an entirety*.

When the statute gives a lien upon the land *upon which* an improvement is constructed, it must be understood in a reasonable and ordinary sense. There can be no sufficient reason why this language,

when used in the statute, must have one meaning, and when used in the contracts between the parties must have an entirely different meaning. The contract of May 8, 1891, distinctly shows that this 22,000-acre tract was the *land upon which* this improvement was to be constructed. It repeatedly speaks of said 22,000 acres as being "*under* said ditch system." (Printed record, fols. 97, 99, 102, 107.) No amount of sophistry can possibly be sufficient to limit the land upon which a lien is given by section 1522 to the actual right of way occupied by this ditch; more especially as section 1529 clearly shows that it is not the land actually occupied by the improvement, but the tract which is intended to be benefited thereby, which is made subject to the lien. This latter section expressly provides that the lien shall subject the owner's entire interest in the lands *upon which* the improvement is constructed with his knowledge.

Such are the facts of the case, and we submit that the contention now made by appellants is not now tenable in this court:

1st, because the appellants are estopped from making any such contention, since they expressly admit, in their pleadings, that all of this 22,000-acre tract was appurtenant to, and covered and benefited by, this improvement;

2nd, because the documentary evidence appearing in the record positively and clearly shows that such was the fact;

3rd, because the New Mexico court distinctly found, upon a consideration of all the evidence, that all of this 22,000-acre tract was appurtenant to this improvement, covered and benefited by it, and necessary to its convenient use, for the purposes contemplated in its construction; which findings of fact are

conclusive upon this appeal and will not now be enquired into by this court; and,

4th, because the law, as applied to the facts appearing in this case, justifies and requires the affirmance of the finding of the court below, that all of this land was "required for the convenient use and occupation of said improvement."

2 *Jones on Liens* (1888) §§ 1368 and 1372.
Derrickson vs. Edwards, 39 N. J. L. 468.
Green vs. Chandler, 54 Cal. 626.
Keppel vs. Jackson, 3 W. & S. 320.

In support of this last proposition we beg to submit the following authorities:

> "In general the lien attaches not only to the land which the building covers, but to the lot of land upon which it stands, and whatever belongs to the lot and is necessary to the enjoyment of the premises. This is a question of fact, not of law."
>
> 2 *Jones on Liens* (1888), sec. 1368.
>
> "The land covered by the lien is generally the whole lot of land belonging to the owner, on which the building is erected, unless the amount of land is restricted or defined by the statute. The court will not restrict the lien to the buildings and the land covered by them, and if they limit the lien to a less quantity of land than the whole lot they will embrace in the lien also the land about the buildings, used with them and necessary or reasonably convenient for their use."
>
> *Ibid.* 1369.
>
> "How much land is necessary for the convenient use and occupation of a building

> and subject to a lien for work and material used in the building, is properly a question for the jury, and oral evidence is admissible to determine it. Testimony showing that the land and buildings had been leased together and sold together tends to show that the lands and buildings are treated as a unit and used for a common purpose, and in the absence of other testimony the court may properly infer that the land so used and treated was reasonably convenient for the use and occupation of the building."
>
> *Ibid.* 1372.

In *Tunis vs. Lakeport*, 98 Cal. 285, cited by counsel for appellants, we find the general principle laid down in the following language:

> "The expression 'the land upon which any building * * * is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof,' should be construed to mean such space or area of land *as is necessary to the enjoyment of the building for the purposes in view of its construction.*"

In *Edwards v. Derrickson*, 28 N. J. L. 39, the court said (pp. 44 *et seq.*):

> "The quantity of land made subject to lien by the act is not merely the land on which the building is actually erected; this is included in express terms, but in addition to this the lot or curtilage on which the building is erected is also subjected." * *
>
> "Here, too, the question is not so much the size of the lot or parcel of land as whether it is one single parcel of land lying together, known as one tract, bought and sold as such, its metes and boundaries generally known and as being the lot, tract or

> parcel of land which the parties naturally understood as those which were appurtenant to or connected with the building or buildings after they should be erected. This is what is meant by the law when it gives the contractor a lien on the building and the lot and curtilage on which it is erected."

We respectfully beg that this Honorable court will read and consider what is said by the New Jersey court upon this subject, at pages 44-48 of their published opinion, as all of it is especially pertinent and instructive upon the question now under discussion, and yet the quotation is too extensive to justify us in inserting it bodily in this brief. It will be seen in this case that for repairs made to the Phenix Mill, the contractor was adjudged a lien on all the tract of land on which the mill stood, amounting to fifty-three acres, and embracing several dwelling-houses and other buildings.

In *Nelson vs. Campbell*, 28 Pa. State, 156, the court gave the claimant a lien upon an entire city lot, embracing several buildings and a stable, upon the ground that (p. 160) "all the property was intended to be improved by each building, and all are therefore subject to the lien."

In *St. Louis Natl. Stock Yards vs. O'Reilly*, 85 Ill. 546, the work was done on a hotel building and a bank building, erected on U. S. Survey No. 627, containing 400 acres, situated near East St. Louis; and the court gave claimant a lien on the entire 400-acre tract.

In *G. P. Storage Co. vs. Southwark Foundry Co.*, 105 Pa. State, 243, upon a claim for work done and materials furnished upon certain grain elevators erected upon a 130-acre tract, the court said:

> "If it is in fact true that all this is but the proper curtilage for the buildings against which the lien is filed, then will that lien cover it."

In *Davis vs. Auxilliary Company*, 9 So. Car. (Richardson), p. 204, the court says:

> "The word 'lot' in its most comprehensive sense might include the whole tract of land upon which any buildings might be situated, without regard to the dimensions of the tract, or the nature of the building. In its most limited sense, the word might be confined to the area actually covered by the building, as the land beneath a residence, but without means of approach. In the latter, the security intended by the statute would be deprived of all value, while in the former the law would be unreasonable and oppressive. When a word has various significations, and its meaning in a statute comes in question, that which is most reasonable is adopted by the court, in the sense in which it is used by the law-makers, and that sense is most reasonable which accords at once with the established principles of law and the manifest intention of the legislature."

In this case, it appears that the buildings erected were a grand-stand and a judges' stand, on a race-course; that there were four tracts of land, parallel to each other and contiguous. Appellant, for whom the buildings were erected, was in possession and control of all four tracts, but held the absolute title to only one of them—tract No. 3. Neither of the buildings was upon tract No. 3, and it was contended by the appellant that this tract No. 3 had been improperly held to be a part of the lot "of land on which the buildings are situated." The court says, on page 207:

"No difficulty arises from the facts in this case, if the law thus announced is sound. The several tracts, 2, 3 and 4, were bought, procured and held for a common and avowed purpose. They were together enclosed by a common fence. The track which passed from the three was marked by a common fence on the inner side. They constituted one parcel, adjacent to the main building and occupied by the smaller. They were used together for a special purpose, and the buildings were erected exclusively to aid in this purpose. The entire lot, containing the three tracts, should properly be regarded, for the purposes of the suit, as the lot of land on which the buildings were situated."

The statute provided as follows:

A builder "shall have a lien upon such building or structure, and upon the interest of the owner thereof in the lot of land upon which the same is situated."

In *Roby vs. University of Vermont*, 36 Vermont, 564, the court says:

"In this case, the court held that the lien created by the proceedings set forth, rested only upon the building upon which the work was done, but carried with it such right to the land upon which the building stands, *and which is appurtenant* to it, as should be necessary to enable the orators to hold, appropriate and use the building for all the legitimate purposes to which such building might be put, in order to render it available as property in its full value and usefulness."

In *Executors of Vandyne vs. Vanness*, 1 Halstead (N. J. Eq.), 485, the following appears on page 490:

"The extent of the lien, as to the subject of it, is shown by the mode pointed out in the act of enforcing it by law. It is to be enforced at law by judgment for the claim filed, and execution against the building and land on which the same is erected. The lien, therefore, is on the building and land on which it is erected."

On page 491 is the following:

"On what land are the claims liens? The act says, *the building and the land* on which it is erected. Is it only the land which the building covers, or is it all of any distinct tract of land on which the building stands? It seems to me it must be one or the other. If it be not confined to the land covered by the building—and this, I think, would be an absurdity—it must be the tract on which the building stands, for, if this be not so, we must make the equally absurd supposition that the legislature intended that the parties, or one of them, or the court, should determine what part of the tract should be subject to the lien; that is, how much of a tract, besides the foundation, a house shall be held to stand upon."

And in concluding, on page 492, the chancellor says:

"It was said, in argument, that the carpenter would get a lien on the entire tract of land, as security for a house he might build on it. I see no reason why he should not, in good sense, and under the language of the act, have a lien on so much of the land, including the house, as will pay for the building of the house; and unless you can confine him to the ground covered by the house, there can be no other rule."

But it does not seem necessary to farther multiply citations or authorities; for the general principle

for which we contend is recognized in the authorities cited upon this point by counsel for appellants. We could not wish for any clearer or more conclusive enunciation of the legal principle applicable to the question than that which we have above quoted from *Tunis vs. Lakeport*. In that case the work was done on a hotel and saloon erected upon or near a tract of land which was used as a race-track and contained the usual buildings and improvements incident to that business. The court below gave a lien not only upon the hotel and saloon buildings, but also upon the adjoining grounds. The Supreme court reversed the case, upon the ground that the race-track and improvements were not appurtenant to, or necessary to the convenient use and occupation of, the hotel and saloon property.

Of the other two cases, *Green vs. Chandler*, 54 Cal. 626, turned solely upon a question of pleading, and has no pertinency to or bearing upon the question in support of which it is cited by opposing counsel.

In *Cowen vs. Griffith*, 108 Cal. 228, cited by opposing counsel, there was a dwelling-house erected upon one of two contiguous twenty-acre lots. The lots were highly improved and planted in vine and fig trees. The trial court, for work done upon the dwelling-house, gave a lien upon the entire forty acres; and the California Supreme court, while recognizing the general doctrine for which we contend, held that under the facts of that particular case the judgment of the court below was excessive; and they also suggest, in passing (although this latter is altogether *obiter*, and, we think, improper, inasmuch as it trespassed upon the province of the jury in the next trial of the case) that in their opinion even twenty acres was, under the circumstances of the

case, excessive. But they nowhere suggest, or even countenance, the doctrine that the lien should be confined to the land actually occupied by the improvement.

Applying, then, the principle announced in the foregoing authorities to the case at bar, we find that this entire 22,000-acre tract "is required for the convenient use and occupation" of this ditch and irrigating system constructed by appellee. Disconnected from the land, the improvement is absolutely worthless. Without the improvement, the land and every part of it was valueless and unmarketable. To say that the appellee was only entitled to a lien upon the strip of land sixty feet wide, upon which the ditch was actually constructed, is to make the security given him by statute absolutely worthless.

This improvement is not such an one as the hotel building involved in *Tunis vs. Lakeport, supra*. The hotel and saloon could easily be operated and conveniently used without the tract of land adjoining. The nature of their business is such that their custom would come from an entirely different source, and any benefit that they would have received from the race track would not have come directly from the track property itself, but would have come from the persons who were incidentally attending upon said race track: so that any benefit which the hotel building derived from that property would not have been direct, but simply remote and speculative.

But in the case at bar this ditch is directly dependent upon the land, and the land directly connected with and dependent upon the ditch; neither could be "conveniently used or operated" without the other.

Nor is this improvement like a mill, built upon a tract of land: because, no matter how large the

tract of land surrounding such a mill, the bulk of its business would necessarily, in the ordinary course of affairs, come from outside of, and be in no way dependent upon, the tract of land. Consequently, we find some cases which in such instances confine the lien to the mill building itself and the adjacent property which is absolutely essential to and directly connected with the milling business.

But in the case of the improvement now under consideration, this ditch must expend its waters upon the said 22,000-acre tract, for there was no other way in which they could be conveniently or at all used. The ditch was constructed upon this 22,000-acre tract, and its use was wholly appurtenant to, and dependent upon, this tract of land, for the record shows, either positively or by necessary implication, that no other lands were reached by this improvement.

The bill of complaint alleges that these lands are appurtenant; the answer admits it. The findings of the court are that the lands are appurtenant to the ditch, and the decree orders that so much of the lands described as may be necessary to pay the principal, interest and costs be sold.

A ditch requires much more land for convenient use and occupation than a house. A lien will attach to land for the building of a fence, and it would be preposterous to say that the amount of land to which such lien would attach for building a fence would be only a convenient space for repairing the same. Appellee contends that the term "convenient use and occupation of the improvement" means all the land that is appurtenant to, is benefited by and for which the improvement was intended. The lien alleging that it is appurtenant, the bill of complaint

alleging to the same effect, and the finding of the court being in accordance therewith upon the evidence, this is conclusive in the court above.

If it should be contended, or even suggested, that this 22,000-acre tract was *not all* required for the convenient use and operation of said ditch, where is the division to be made between that which is required and that which is not required? The court below found that it was all required, and we submit that under the authorities already cited, that is conclusive upon this point. But if it were not, where in this record can this Honorable court find the data necessary to select out and segregate those portions of this 22,000-acre tract upon which appellee is entitled to a lien, from those portions which should be declared free from any lien? Thus we see that the controversy is absolutely narrowed down to this position, to-wit: that the appellee was either entitled to a lien upon *this entire 22,000 acres*, or he was not entitled to a lien *upon one single acre* of that tract, or upon anything outside of the sixty-foot strip upon which the ditch was actually located. We do not believe that any justification can be found, in law, authority, statute, justice, or reason, which would confine appellee to the narrow right of way actually occupied by the improvement; and if we are correct in this position, then it unavoidably follows that he was entitled to the lien adjudged to him by the court below upon this entire 22,000-acre tract, which "is appurtenant to and covered by this improvement," and which is "necessary to the enjoyment of the improvement for the purposes in view" by the appellants and each of them, when they caused it to to be constructed.

In conclusion, we most respectfully submit that none of the positions taken by opposing counsel in

his brief are tenable, and that, both under the law and under the facts, the adjudication of the New Mexico court is correct and should be affirmed.

Respectfully submitted,

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the name of the person by whom he was employed, or to whom he furnished the materials." The claim duly filed by Ford was preceded by a title describing the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners"; and stated a demand for the sum of $17,634.27, as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said the Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract"; and it stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof." *Held*, that this claim of lien was sufficient under the statute in respect of all these particulars.

As between the parties the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, does not vitiate the claim when honestly made; and under the findings it is impossible to impute bad faith in this instance.

The findings show that Ford carried out the conditions of the contract by him to be kept and performed; that he made no objection to the deed, and would have been willing to receive it, but for appellants' failure on their part; and they cannot now be allowed to insist that Ford should be required to accept what they have not indicated a willingness or readiness to deliver; still less that the lien should be held invalidated because Ford did not credit $8000 for land never conveyed to him.

To limit the land upon which the lien was given to the strip of land sixty feet in width and twenty-six miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would be to unreasonably circumscribe the meaning of the statute.

As the Supreme Court expressly found that it appeared "by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs and were under said ditch and to be irrigated thereby," it cannot now be urged that the description was void for uncertainty or that the decree included more land than was connected with the ditch.

Statement of the Case.

THIS was a bill filed by Patrick P. Ford against the Springer Land Association and others in the District Court of New Mexico for the county of Colfax, to foreclose a mechanic's lien upon an irrigating ditch and reservoir system; the land covered thereby; the right of way therefor; and the particular lands intended to be irrigated. A cross bill was filed by the Springer Land Association and other defendants. The cause was heard on pleadings and proofs, and on findings of fact and conclusions of law duly made and filed, the District Court entered a decree in favor of Ford, adjudging a lien for the sum of $22,097.75, with interest and costs, on the ditch and reservoirs in question, together with the right of way, specifically describing them, and also on twenty-two thousand acres of land appurtenant to the ditch and to be irrigated thereby, specifying forty-six sections in four designated townships.

It was further decreed that the Springer Land Association and other defendants pay or cause to be paid the sum found due with interest and costs, (three thousand dollars thereof to be paid to the clerk of the court,) within ninety days, and in case of default that the property be sold by a special master and the proceeds distributed as prescribed, three thousand dollars to be retained by the clerk of the court to await the determination of a suit by Dargel, a subcontractor, to recover the amount of $2279.30, with interest and costs, or its payment and discharge by Ford. If a surplus was realized at the sale it was to be held subject to the further order of the court; if a deficiency resulted, the amount was to be reported by the master to the court.

The case was carried to the Supreme Court of the Territory, which found the facts, in substance, to be these:

On October 26, 1888, the Springer Land Association entered into a contract with Patrick P. Ford for the grading work in the construction of a certain ditch line and reservoir system for irrigation in Colfax County, New Mexico, which contract and the specifications forming part of it were set forth at length.

The contract provided: "The party of the first part agrees to furnish all necessary tools and labor, and perform all the

work of grading required in the construction of the Cimarron ditch and its accessories. Said work to be done in a thorough and workmanlike manner, and in full accordance with the specifications hereto attached and made a part of this contract. Said first party agrees to begin work within ten days after signing this contract, and to complete the same on or before July 1, 1889. The party of the second part agrees to pay said first party for work so done at the rate of eleven cents per cubic yard, without classification. And the amounts due for said work shall be paid at the time and in the manner described in the specifications hereto attached."

Specification 11 related to allowance for extra work when done under the orders of the engineer.

Specifications 13 and 15 were:

"13. Subcontracts. — Subcontracts must be submitted to the engineer, and receive his approval, before work is begun under them. No second subcontractor will be allowed. Subcontractors will be bound by the same specifications as the contractor, and will be equally under the authority of the engineer."

"15. Estimates. — On or about the first day of each current month, the engineer will measure and compute the quantity of material moved by the contractor during the preceding month; he will certify the amount to the company, together with an account of the same at the price stipulated, which amount will be audited by the company without unnecessary delay, and the amount thereof, less ten (10) per centum retained, will be paid to the contractor in cash within ten days thereafter. This retained percentage will be held by the company as a guarantee for the faithful completion of the work, and will be paid in full with the final estimate upon the certificate of the engineer accepting and approving the work, it being expressly understood that the failure of the contractor to fulfil his obligations will work a forfeiture of this retained percentage to the company. The amount due to the contractor under the final estimate, will only be paid upon satisfactory showing that the work is free from all danger from liens or claims of any kind, through failure on his part to liquidate his just indebtedness as connected with this work."

"Previous to the making of the last mentioned contract and on May 1, 1888, the Maxwell Land Grant Company made a contract with C. C. Strawn and associates, who afterwards organized the Springer Land Association, which succeeded to their rights and obligations, by which the Maxwell Company gave to them a right of way for the proposed irrigation system of ditches and reservoirs, and by which said agreement it was, among other things, provided that with the view of selling certain of its lands at an enhanced value, and in consideration of certain perpetual water rights and franchises, to be granted to it by the other party, it agreed to set apart and reserve from sale 22,000 acres of its lands, to be selected by the other party, and give to the other party a certain portion of the proceeds which might be derived from the sale of said lands when sold. These lands were under the proposed ditch system and to be irrigated by it, and by this agreement Strawn and his associates were to expend about sixty thousand dollars, or a sufficient sum, to complete the enterprise on the proposed plan." This contract was set forth *in extenso.*

"The title of the lands at that time and at all times afterwards was and remained in the Maxwell Land Grant Company, except as to the rights acquired by Strawn and associates and their successors in interest under said contract. The same contract constituted Strawn and his associates and successors in interest the agents of the Maxwell Company to the extent of and for the purpose of carrying into effect the spirit and intent of the contract as to the sale of the said lands, but that party, the Springer Land Association, had no other title in the lands than as given by said contract.

"Five days subsequent to the making of his grading contract complainant Ford entered into another contract with the Springer Land Association by which he agreed to select and accept one section of land under the proposed ditch system at the stipulated price of eight thousand dollars, to be taken as part payment on the contract price for Ford's grading work, by way of deduction of that sum from the final estimates on the contract for the construction of said ditch.

"The contract of May 1, 1888, designated one E. H. Kel-

logg as the engineer to have charge of the construction of said system of ditches and reservoirs. No engineer was named in the contract between Ford and the Springer Land Association of October 26, 1888, but said Kellogg, with the assent of all parties, acted throughout as the supervising engineer.

"Ford let subcontracts for portions of the work to McGarvey, Dargel and Haynes."

That with Dargel was given in full, and the three were of like form and tenor and approved by the engineer. Each contained this clause: "It is mutually agreed that the amounts of these sub-estimates will in no case be demanded or paid in advance of the payment of the regular estimate."

Estimates, as provided by the contract of October 26, 1888, were made by the supervising engineer from time to time, which were audited and paid by the Springer Land Association up to about May, 1889.

Estimate No. 6 was dated April 30, 1889, and showed the amount then due and payable, after reserving ten per cent, to be $5010.92. The amount of this estimate has never been paid.

June 13, 1889, the engineer gave Ford a written acceptance of the work and a final estimate, set forth at large in the findings. The total amount payable under the contract was $48,553.56. The six prior estimates aggregated $35,928.03, and the last and final estimate was for $12,625.53, but as the sixth estimate of $5010.92 had not been paid the total amount due was $17,636.45.

"This amount the Springer Land Association refused to audit and pay on the ground that the sum so stated was in excess of the amount due; that the work had not been completed according to contract; that the engineer's final estimate was erroneous either through fraud, inadvertence or mistake, because the subcontractors had not been paid the several sums due them on the work by Ford, and that the property was not free from danger from liens, and also that Ford should accept the section of land which he had agreed to accept and which he had previously selected in payment of $8000 of the amount of such final estimate.

"The Springer Land Association procured to be made and

properly executed a deed of conveyance by the Maxwell Land Grant Company, which held the title, to Patrick P. Ford, conveying to him the section of land which had been selected by said Ford, and had the said deed present in the hands of an agent of said Maxwell Company on June 19, 1889, when the representative of the Springer Land Association, said Ford, and his subcontractors met for final settlement; said deed to be delivered to said Ford upon payment to the agent of said Maxwell Company by the Springer Land Association of $4000. The representative of the Springer Land Association had with him at that time, for the purpose of making settlement with Ford, currency and valid checks on a responsible Chicago bank for $17,000. He notified said agent and Ford that he was ready to pay the $4000 to the agent of the Maxwell Company for the deed if Ford would settle with his subcontractors. Ford examined the deed and made no objection to it. McGarvey, one of the subcontractors then present, claimed that Ford owed him about $4000, which Ford disputed as to $300.00 of it. Ford would not settle unless McGarvey would accept the amount he admitted and give him a receipt in full, which McGarvey refused to do, and claimed that he had a lien on the ditch and reservoir for the amount of his claim. The agent of the Springer Land Association offered to pay the subcontractors directly if Ford would agree with them as to the amounts due them. No settlement was made between Ford and McGarvey. McGarvey then informed the agent of the Springer Land Association that the work was not done according to contract, upon which the latter disputed the correctness of the final estimate and ultimately refused to audit the same. The said disagreement between Ford and Subcontractor McGarvey was one of the reasons why the deed was not delivered to Ford. The representative of the Springer Land Association did not tender to the agent of the Maxwell Company the amount due it upon said deed, and that no sufficient tender of the deed was made to Ford to require him in law to accept it."

The sums claimed by the several subcontractors at that time amounted to $7537.72.

Thereupon, on July 3, 1889, complainant Ford filed his notice of claim of lien for $17,634.27 alleged to be due on the contract, including all moneys due subcontractors at that time; and $390.00 for extra work.

This claim asserted a lien on the ditch and right of way and the twenty-two thousand acres of land to secure the payment of said two sums according to the contract, a copy of which and of the specifications was attached to and made part of the claim; stated when the work was commenced, completed and accepted; made the Springer Land Association and others, and the Maxwell Land Grant Company and others, parties to the notice; gave the Maxwell Land Grant Company and others as the reputed owners; stated that claimant was employed to do the work "by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president;" and that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof." It was properly verified, duly filed and recorded, and action commenced within the statutory time.

McGarvey and Dargel, subcontractors, filed notices of liens and commenced suits, and Dargel's suit was pending at the date of the decree.

The findings continued:

"It appears by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside of the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and reservoirs — were under said ditch and to be irrigated thereby; that the same were included within the sections described in the notice of lien and bill of complaint. It does not appear that the particular sections described were selected or segregated by the Springer Land Association under its contract of May 1, 1888, as capable of irrigation, and it does appear that in a number of the said sections only portions of the section were selected, because a number of them were not flooded or situated so as to be overflowed with water or irrigated from the ditch. All of said

sections were situated between the line of said ditch and the river and were enhanced in value by reason of its construction.

"It appears that complainant Ford paid to his several subcontractors all amounts due them under the first five monthly estimates, but at the time of the commencement of this suit had not paid what was due them under the sixth estimate (May, 1889) nor under the final estimate of June 13, 1889."

It was also found that there was no collusion between Ford and the engineer as charged in the cross bill; that the acceptance by the engineer was conclusive, and the amount shown by his estimates correct.

The decree was affirmed, 41 Pac. Rep. 541, and an appeal was then taken to this court.

Errors were assigned as follows:

"1. That the claim or notice of lien, to foreclose which this suit was brought, was insufficient in law to create a lien.

"2. That the amount claimed and adjudged as a lien was excessive, and included claims not due or payable.

"3. That the final estimate was not payable by reason of the existence of liens of subcontractors.

"4. That defendant should be entitled to be credited with the sum of $8000 on the final estimate, on account of land which was to have been taken in payment thereon.

"5. That no lien attached to the land outside of the ditches, reservoirs and the right of way for the same."

The Compiled Laws of New Mexico, of 1884, Title 24, c. 1, contain these sections:

"§ 1519. A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.

"§ 1520. Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, flume, tunnel, fence, machinery, railroad, wagon road or aqueduct to create hydraulic power, or any other structure, or who performs labor in any mining claim, has a lien upon the same for the work or labor done or materials furnished by each, respectively, whether done or furnished at the instance of the

owner of the building, or other improvement or his agent; and every contractor, subcontractor, architect, builder or other person having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner, for the purposes of this act."

"§ 1522. The land upon which any building, improvement or structure is constructed, together with a convenient space about the same, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, is also subject to the lien, if at the commencement of the work, or of the furnishing the materials for the same, the land belonged to the person who caused said building, improvement or structure to be constructed, altered or repaired, but if such person owned less than a fee simple estate in such land, then only his interest therein is subject to such lien."

"§ 1524. Every original contractor, within ninety days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this act, must within sixty days after the completion of any building, improvement or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the county recorder of the county in which such property or some part thereof is situated, a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by the oath of himself or of some other person."

"§ 1526. The recorder must record the claim in a book kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed; and for which he may receive the same fees as

Counsel for Appellants.

are allowed by law for recording deeds and other instruments."

"§ 1529. Every building or other improvement mentioned in section 1520, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this act; unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to the effect, in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

"§ 1530. The contractor shall be entitled to recover upon a lien filed by him only such amount as may be due to him according to the terms of his contract, after deducting all claims of subcontractors under him who have filed liens for work done and materials furnished, as aforesaid, and in all cases where a lien shall be filed, under this act for work done or materials furnished to any contractor, he shall defend any action brought thereupon at his own expense; and during the pendency of such action the owner may withhold from the contractor the amount of money for which lien is filed, and in case of judgment against the owner, or his property, upon the lien, the said owner shall be entitled to deduct from any amount due, or to become due, by him to the contractor the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

Mr. Frank Springer for appellants.

SPRINGER LAND ASSOCIATION *v.* FORD.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

No. 89. Argued November 5, 1897. — Decided December 13, 1897.

Section 1524 of the Compiled Laws of New Mexico providing for the creation of mechanics' liens for work done on land, required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also

Mr. Joel F. Vaile for appellee. *Mr. Edward O. Wolcott*, *Mr. Charles W. Waterman* and *Mr. William W. Field* were on his brief.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

Although mechanics' liens are the creation of statute, the legislation being remedial should be so construed as to effectuate its object. *Davis* v. *Alvord*, 94 U. S. 545; *Mining Co.* v. *Cullins*, 104 U. S. 176.

Substantial compliance, in good faith, with the requirements of the particular law is sufficient, and the test of such compliance is to be found in the statute itself.

These enactments vary in the different States and Territories, and to the variance in their terms, judicial decisions necessarily conform.

Section 1524 of the Compiled Laws of New Mexico required the contractor, in order to obtain the benefit of the act, to file for record "a claim containing a statement of his demands, after deducting all just credit and offset, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials."

The claim duly filed by Ford was preceded by a title describing the Springer Land Association and others and the Maxwell Land Grant Company and others, as "owners or reputed owners;" and stated a demand for the sum of $17,634.27, as "the balance due and owing to the said Patrick P. Ford, by the aforesaid owners, or reputed owners, after deducting all just credits and offsets for excavating and embankments done and performed by him under a certain contract entered into by the said Springer Land Association, a copy of which contract is hereto annexed and made a part of this claim of lien. As also for the further sum of three hundred and ninety dollars ($390) for excavating and hauling, ordered by the engineer in charge of said ditch, and allowed by him in pursuance of the provisions of said contract;" and

it stated when the work was commenced and when it was finished, and that on the last date it was "completed and accepted." It gave the names of the reputed owners of the land as the Maxwell Land Grant Company and others, enumerating them, trustees of that company; and alleged that claimant "was employed to do the said work by the Springer Land Association, C. N. Barnes, general manager, approved by C. C. Strawn as president." And it added that "the terms, time given and conditions of said contract are those that fully appear in the copy of the said contract which is attached hereto and made a part hereof."

We entirely agree with the Supreme Court of the Territory that this claim of lien was sufficient under the statute in respect of all these particulars. It is attacked by counsel for appellants because containing "no statement of the amount of work done; nor of the payments made; nor the estimate or acceptance by the engineer;" and also because "erroneous as to the party from whom due." But this statute did not require, as many such statutes do, "a just and true account," or "a full and true account" of the details of the transaction, and this work was done under a special contract, at so much per cubic yard, to be paid for on engineer's certificates. In our judgment Ford's statement of his demands, with the copy of the contract and specifications annexed, was in reasonable and adequate compliance with the statute.

As to the name of the person by whom Ford was employed, the claim was specific; and the names of the owners or reputed owners of the lands, and their connection with the transaction, were also given with sufficient clearness. With reference to similar statutory provisions, the Supreme Court of California in *Davies Henderson Lumber Co.* v. *Gottschalk*, 81 California, 641, 646, said: "There is nothing in the section, or any other, that requires the material-man to state in his claim of lien what relation the person to whom he furnished the material bore to the owner, whether contractor or agent; nor does the burden of determining whether any contract made, or attempted to be made, between the owner and contractor, was valid or not, rest on him when he comes to file

his lien. He must state the facts required by the statute. Whether the person to whom he furnished the material had authority to bind the owner, and entitle the material-man to a lien, is a matter of pleading and proof at the trial." And in *Jewell* v. *McKay*, 82 California, 144, it was held that it was not even necessary that the notice of lien should state that the owner of the land had knowledge of the work.

By section 1520 of this statute a lien is given for work or labor done at the instance of the owner of the improvement "or his agent;" by section 1529 it is provided that every improvement "constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein," unless he shall give notice that he will not be responsible for the same; and by section 1522, the land upon which any improvement is constructed, "together with a convenient space about the same," is also subject to the lien if at the commencement of the work it belonged to the person who caused the improvement to be constructed.

The contract of May, 1888, between the Maxwell Land Grant Company and those who afterwards constituted the Springer Land Association was entered into for the construction of this irrigating system, and it expressly made the Springer Land Association "the agent of the Maxwell Land Grant Company," with power to do all acts necessary to carry out the proposed improvement, and to sell and dispose of the lands designed to be benefited thereby; and the findings of the Supreme Court were to the effect that the Maxwell Land Grant Company was the person at whose instance the improvement was made, and knew at the time that the work was being carried on.

The courts below concurred in their findings that the amounts demanded were the amounts due, and the decree provided for the payment of the only outstanding claim of a subcontractor. But it is urged that the aggregate claimed in the notice of lien was so excessive as to invalidate the lien in whole or in part.

We do not understand that as between the parties the fact that a lien is claimed for a greater sum than is actually owing, or is actually covered by the lien, vitiates the claim when honestly made; and under the findings it is impossible to impute bad faith in this instance.

The contract contained this provision: "The amount due to the contractor under the final estimate will only be paid upon satisfactory showing that the work is free from all danger of lien or claims of all kinds, through failure on his part to liquidate his just indebtedness as connected with this work."

And it is said that "the final estimate of $12,625.53 was not yet due," in that the subcontractors had not been paid in full, and the work, therefore, was not free from all danger of liens. The findings show, however, that by the contracts between Ford and his subcontractors, approved by the supervising engineer, the amounts due the subcontractors, on monthly sub-estimates, were in no case to "be demanded or paid in advance of the payment of the regular estimate;" that Ford on payment of the regular estimates had paid his subcontractors in full; and that the sub-estimates for May and the final sub-estimates had not been paid because appellants had not paid Ford his May and final estimates under their contract with him. The May estimate due him was for $5010.43, and the balance of $12,625.53 contained nearly $4000 of retained percentage, being ten per cent of the amount due for work done up to the time the May estimate was issued; while the amounts claimed by the subcontractors on the completion of the work aggregated $7537.72. It is quite clear that if there were any danger from liens or claims of any kind, this was not "through failure on his part to liquidate his just indebtedness as connected with this work," but solely by reason of the failure to pay him according to the terms of the contract. And it should be noted that the correctness of Ford's claim does not appear to have been questioned until the nineteenth of June, 1889, when one of the subcontractors having become involved in a dispute with Ford over the sum of $300, suggested to the Springer Land Association that the work had not been done according to the con-

tract, a suggestion which the findings show was without foundation.

Appellants' counsel further contended that the lien was excessive because appellants were entitled to a credit of $8000 for land which Ford had agreed to accept in part payment of the final estimate.

At the conference, on the 19th of June, 1889, between the agents of the Maxwell Land Grant Company and of the Springer Land Association, Ford, and the subcontractors, the Maxwell agent had in his possession a deed conveying a section of land to Ford, which he notified the Springer agent he was ready to deliver upon the payment of $4000 by the Springer Land Association. The Springer agent responded that he was willing to pay the $4000 if Ford would settle with the subcontractors, but he did not perform the condition and accept the deed. Nor was any tender of the deed made to Ford, who was simply informed that if he would, compulsorily, do that which the default of the Springer Company had theretofore rendered impracticable, then the Springer agent would obtain the deed for delivery to Ford. Nor did it appear that since that day there had been any offer to deliver, or a declaration of a willingness to deliver, the deed. The findings show that Ford carried out the conditions of the contract by him to be kept and performed; that he made no objection to the deed, and would have been willing to receive it, but for appellants' failure on their part; and they cannot now be allowed to insist that Ford should be required to accept what they have not indicated a willingness or readiness to deliver; still less that the lien should be held invalidated because Ford did not credit $8000 for land never conveyed to him.

Finally it is objected that the demand of $390 for extra work rendered the entire claim of lien inefficacious, but it is obvious that this was not an overstatement which could have that effect. Though there is no specific finding by the Supreme Court in reference to this item, the findings of the District Court show that the extra work was performed under the direction of the engineer, and that the bills therefor were approved by him to an amount exceeding this minor demand,

which under the specifications appellants were bound to pay. It was properly included in the notice of lien, and, being manifestly due, the decree ought not to be reversed or even modified, because it formed part of the amount decreed.

The last error assigned is that no lien attached to the land outside of the ditches, reservoirs and the right of way to the same.

The statute gave a lien for labor performed or materials furnished in the construction of ditches, not only on the ditch and the land through which it was constructed, but on so much of the land about the same as might be required for its use, "to be determined by the court on rendering judgment."

This tract of 22,000 acres was the tract for whose irrigation the ditch was constructed and by which it was to be benefited. The ditch and the land were inseparably connected as parts of the common enterprise, and to sever the ditch from the land would render the ditch practically valueless. The claim of lien stated, the bill in this case averred and the answer admitted, that Ford contracted to perform the work of grading required in the construction of the Cimarron Ditch and its accessories, the ditch being situated as described; and "that the said ditch has and appurtenant thereto along its entire length, land as passageway about sixty feet in width; as also lateral ditches and reservoirs, and the land covered thereby, and also appurtenant to said ditch, twenty-two thousand acres of land in said county, and under said ditch, and to be irrigated thereby, and described as follows," namely, certain sections enumerated.

The contract with the Maxwell Land Grant Company showed that it caused the improvement to be made for the purpose of supplying water to the entire acreage under the ditch, and in consideration of the construction of the improvement, gave to the Springer Land Association an interest in the 22,000 acre tract. The improvement was projected and constructed upon the property as an entirety, though the contract contemplated that after its completion the tract should be cut up and sold in small holdings, the Maxwell Company manifestly causing the improvement to be made for the express purpose of rendering the land salable.

To limit the land upon which the lien was given to the strip of land sixty feet in width and twenty-six miles long, which was actually occupied by the ditch, and exclude the tract which the ditch was constructed to benefit by its continuous operation, would, it seems to us, be to unreasonably circumscribe the meaning of the statute. And appellants' pleading not only admitted that all of the 22,000 acre tract was appurtenant to the improvement and benefited by it, but the courts of New Mexico distinctly found this to be so, and that the tract was necessary to the convenient use of the improvement for the purposes contemplated in its construction.

The truth is that what area of land is subject to lien in a given case largely depends on the character of the improvement. The extent of ground proper and necessary to the enjoyment of a building, a wall, or a fence, would not be the same as that required for or appertaining to an irrigation system, but the principle of determination is the same.

This ditch was to expend its waters on this tract and could not be used or operated without it. Each was dependent on the other, and both were bound together in the accomplishment of a common purpose. The lien must apply to the entire tract or be confined to the right of way through which it took its course, and to narrow it down to the latter would be to disregard the very terms of the statute.

Appellants admitted the tract to appertain to the ditch and the Supreme Court so found, and that it was required for the use and operation thereof. We perceive no adequate ground for declining to accept that conclusion.

The description of the land was by sections and townships, and forty-six sections were enumerated. As the sections, if full, would contain 29,440 acres, and as the enterprise embraced 22,000 acres — though it was estimated by the Maxwell contract that the ultimate capacity of the ditch might be adequate to the irrigation of 30,000 acres — it is insisted that the description was void for uncertainty or that the decree was erroneous as including more land than could on any theory be held to appertain to the ditch. But a Congres-

sional township of thirty-six sections does not necessarily contain thirty-six times six hundred and forty acres; and subdivision fifth of section 2395 of the Revised Statutes provides: "Where the exterior lines of the townships which may be subdivided into sections or half sections exceed, or do not exceed six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half sections in such township, according as the error may be in running the lines from east to west, or from north to south."

The Supreme Court pointed out that sixteen of these sections were bounded by the northern and western lines, and held that the court might as well presume that the alleged discrepancy was accounted for by a deficiency in the government surveys, as that the forty-six sections contained the full quantity. And it should be remembered that the acreage occupied by the ditch, the lateral ditches and reservoirs must have been considerable.

Again, as the Supreme Court said, quantity in description must yield to definite description by metes and bounds, or by name and number. Quantity may aid but cannot control such description.

The claim of lien, after describing the ditch, its accessories, and right of way, and the 22,000 acres, added, "all of which ditch, laterals and reservoirs and lands as aforesaid are plotted and laid out on the plan hereto attached and made a part of this claim of lien." This was so stated in the bill and admitted in the answer.

While one of the findings is somewhat obscure, and, standing alone, might create a doubt as to the identification of the particular tract, yet the findings taken together and in connection with the plat evidently made this certain; and as the correctness of the description and acreage was admitted, any contention in this regard comes too late.

The Supreme Court expressly found that it appeared "by the admissions in the pleadings and from the testimony that the 22,000 acres of land outside the ditches and reservoirs and the right of way for the same were appurtenant to said ditch and

reservoirs and were under said ditch and to be irrigated thereby."

We think it cannot now be urged that the description was void for uncertainty or that the decree included more land than was connected with the ditch.

Decree affirmed.
